Supreme Court, U.S.
FILED
JUL 5 - 2006
OFFICE OF THE CLERK

No. 06-23

In The Supreme Court of the United States

STATE OF WYOMING,

Petitioner,

v.

MICHAEL DAVID JIMENEZ; WESLEY O. LIVINGSTON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Bryan A. Skoric
Counsel of Record
Park County and Prosecuting Attorney's Office
State of Wyoming
1002 Sheridan Avenue
Cody, Wyoming 82414
(307) 527-8660

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED

Whether the court of appeals erred in ruling it was harmless for the district court to deny the State of Wyoming a statutorily mandated evidentiary hearing.

Whether the court of appeals erred in affirming that immunity was properly determined.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

A. The court of appeals erred in ruling it was harmless for the district court to deny the State of Wyoming the statutorily mandated evidentiary hearing 6

1. Procedural Aspects Regarding Removal 7

2. Statutory Provisions Regarding Removal 7

3. Principles Governing Removal 10

4. Standards for Removal 11

5. Application of Removal Statutes to This Case.....12

B. The court of appeals erred in affirming the district court's order that immunity was proper.....16

1. Basis of the Defense.....16

2. Standard.....17

3. Elements of the Defense of Immunity.....18

4. Respondents Did Not Satisfy the Elements of Sovereign Immunity so as to be Entitled to a Dismissal under Rule 12(b), FED. R. CRIM. P.....19

5. Material Questions Existed as to the Objectively Reasonableness of Respondents' Actions.....21

CONCLUSION.....28

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Manypenny,
451 U.S. 232 (1981) 11, 12, 20

Boyce Motor Lines, Inc. v. United States,
342 U.S. 337 (1952) 20

Colorado v. Symes,
286 U.S. 510 (1932) 15

In re Neagle,
135 U.S. 1 (1890) 16, 18

Kentucky v. Long,
837 F.2d 727 (6th Cir. 1988) 19, 21

Maryland v. Soper,
(No. 1) 270 U.S. 9 (1926) 15

The Mayor v. Cooper,
73 U .S. (6 Wall) 247 (1867) 11, 16

Mesa v. California,
489 U.S. 121 (1989) 11, 12, 15

Morgan v. California,
743 F.2d 728 (9th Cir. 1984) 20

New York v. Tanella,
239 F. Supp. 2d 291 (E.D.N.Y. 2003) 13

New York v. Tanella,
281 F. Supp. 2d 606
(E.D.N.Y. 2003), *aff'd*,
374 F.3d 141 (2d Cir. 2004).....*passim*

Tennessee v. Davis,
100 U.S. (10 Otto) 257 (1879) 16

STATUTES

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1442.....7, 26

28 U.S.C. § 1442(a)(1).....1, 3, 7

28 U.S.C. § 1446.....2, 8

28 U.S.C. § 1446(a).....7

28 U.S.C. § 1446(a)(1).....7

28 U.S.C. § 1446(c)(5).....6, 7, 12

W.S. § 6-3-204(a).....2

W.S. § 6-3-204(a)(c) 4-5

W.S. § 6-3-303(a).....2

W.S. § 6-3-303(a)(b).....4

RULES

FED. R. CRIM. P. 12(b).....17, 19, 20, 26

FED. R. CRIM. P. 12(b)(2) 2, 6, 14, 19

PETITION FOR WRIT OF CERTIORARI

Bryan Alan Skoric, Park County and Prosecuting Attorney, State of Wyoming, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-44) is reported at 443 F.3d 1211 (10th Cir. 2006).

JURISDICTION

The judgment of the court of appeals (App., *infra*, 1-44) was entered on April 6, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1442(a)(1), states:

> A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under

> color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. App., *infra*, 80.

2. 28 U.S.C. § 1446 – Procedure for Removal:

   Set forth in the appendix. App., *infra*, 81-83.

3. FED. R. CRIM. P. 12(b)(2), states:

> A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

STATEMENT OF THE CASE

This case concerns the negative impact on the rule of law when federal officers choose to remove state criminal prosecutions to federal court utilizing procedures in violation of congressional mandates, and the resulting absolute prejudice for a State when proper procedures are not followed.

On April 16, 2004, the State of Wyoming filed separate Misdemeanor Informations in the Park County Circuit Court alleging that Respondent Jimenez and Respondent Livingston violated Wyoming Statute § 6-3-303(a), which prohibits knowingly entering the land of another without authorization, and Wyoming Statute § 6-3-204(a), which prohibits the placing or depositing of objects on the property of another. Respondent Livingston appeared before the circuit court on May 11, 2004 for an arraignment.

Respondent Jimenez never appeared before the circuit court. Jimenez filed a notice of removal in the United States District Court for the District of Wyoming on May 4, 2004. The district court entered an order of removal pursuant to 28 U.S.C. § 1442(a)(1) on May 7, 2004. On May 10, 2004, Livingston filed a notice of removal in the district court and the court entered an order of removal pursuant to 28 U.S.C. § 1442(a)(1) on the same date. App., *Infra*, 9.

The circumstances which drove the prosecution occurred on private deeded land on February 14, 2004. App., *infra*, 84-88. A wolf pack being monitored by Respondent Jimenez was discovered near Meeteetse, Wyoming. Respondent Jimenez received authorization from his superiors to organize an operation to radio collar the pack. App., *infra*, 5-6.

The operation, engaged in by both Respondents resulted in the capture and radio collaring of five wolves on February 14, 2004. App., *infra*, 6-7. The court of appeals, relying solely on the declarations of the Respondents, described the operation as follows:

One wolf was net gunned, physically restrained, radio collared, and released. Three wolves were net gunned and then immobilized with darts and another wolf was darted on a rocky slope where it was unsafe to land. The helicopter harassed this last wolf down a hill toward a gravel road where it was safe for the helicopter to land. After dropping Respondent Jimenez off on the road, the helicopter went to retrieve the three other darted wolves. Respondent Jimenez walked up a hill to retrieve the immobilized wolf. He

carried this wolf down the slope to a shaded patch of snow near the road. *Id.*

During the operation on February 14, 2004 to radio collar the wolf pack, the helicopter also utilized a Global Positioning System (GPS) to identify where the animals were darted or netted. Five wolves were netted or darted and each of those events occurred on privately owned property. App., *infra*, 6-7; 84-88.

After the wolves had been captured, Respondents were confronted by Mr. Randall Kruger, an employee and shareholder of the Larson Ranch Company, situated in Park County, Wyoming. App *infra*, 8. It was subsequently confirmed that the location where the wolves were placed was also private deeded property belonging to the Larson Ranch Company. *Id.* Mr. Kruger took photographs of the area at the time showing the location of the wolves on private land. *Id.*

Respondents admitted that the policy utilized with respect to wolves and private land was to always locate the owner of the property and obtain permission to go onto the private property. App., *infra*, 6; 47. Respondents made no attempt to do so in this case, even though the majority of land in the area was private. App., *infra*. 88.

As a result of an investigation by the Wyoming Attorney General's Office, Division of Criminal Investigation, charges were filed in the Circuit Court, Park County, State of Wyoming on April 16, 2004. Respondents were charged with violating W.S. § 6-3-303(a)(b), misdemeanor trespass; and W.S. § 6-3-

204(a)(c), illegally depositing objects on the land of another, also a misdemeanor. App., *infra*. 9

REASONS FOR GRANTING THE PETITION

The court of appeal's decision in this case is contrary to law, and the resulting prejudice to a State prosecuting federal officers in federal court under federal procedures utilizing the parameters developed in this case cannot fundamentally stand.

The State of Wyoming does not dispute that federal officers are entitled to have certain criminal prosecutions removed to federal court. In fact, the State of Wyoming realizes the importance of removal and Supremacy Clause immunity in the history of this country, as did the court of appeals. App., *infra*, 2-3. At times, removal can serve a useful and necessary purpose, but a guarantee of removal is never an absolute as it was treated by the district court and the court of appeals in this case.

The decision of the court of appeals directly contravenes the statutory mandates of Congress, wherein district courts in removal cases are required to follow a prescribed set of procedures. Congress, in crafting the removal statutes, was only acknowledging what the court of appeals acknowledged, that in this Country's history, the doctrine of Supremacy Clause immunity has played a role in some of the most dramatic clashes between states and the federal government. App., *infra*, 2. It is undisputed that these clashes have occurred and they will occur again. Therefore, these federal/state clashes require strict adherence to congressional mandates to ensure

neutral ground for these inevitable highly charged controversies.

As a result of the procedures utilized in this matter and the missteps in removing this case to federal court, the State of Wyoming asserts that the court of appeals erred in both its conclusion that the district court's refusal to grant an evidentiary hearing was harmless given the unequivocal statutory language of 28 U.S.C. § 1446(c)(5), and that Supremacy Clause immunity was legitimately determined, based on the district court improperly becoming a fact finder rather than determining solely whether issues were in dispute in considering a routine Rule 12 (b)(2), FED. R. CRIM. P. motion.

To better understand the State of Wyoming's argument, it is necessary to undertake a more detailed examination of the procedures followed, or not followed as the case might be, and the important intertwining nature of removal and immunity.

A. The court of appeals erred in ruling it was harmless for the district court to deny the State of Wyoming the statutorily mandated evidentiary hearing

Federal law states that a district court "shall" conduct an evidentiary hearing prior to removal of a case to federal court. 28 U.S.C. §1446(c)(5), App., *infra*, 82-83. The record is clear that this did not occur, even though the State of Wyoming requested the hearing and was entitled by law to such hearing. In addressing this issue, the court of appeals even

determined the language was "unequivocal". App., *infra*, 30.

1. Procedural Aspects Regarding Removal

In this case, a Notice of Removal of Criminal Prosecution was filed by each criminal defendant, pursuant to U.S.C. §§ 1442(a)(1) and 1446(a). The district court entered its Order of Removal of Criminal Prosecution pursuant to 28 U.S.C. § 1442(a)(1). The State of Wyoming promptly filed a Motion to Vacate Order of Removal of Criminal Prosecution. In its Motion to Vacate, the State of Wyoming argued: 1) the Motion was premature under 28 U.S.C. § 1446(a)(1); and 2) that the Order was defective because no evidentiary hearing had been held pursuant to the mandate of 28 U.S.C. § 1446(c)(5). App., *infra*, 49-50.

2. Statutory Provisions Regarding Removal

The relevant portions of the removal statutes are as follows:

28 U.S.C. § 1442: Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1446: Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to *Rule 11 of the Federal Rules of Civil Procedure* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) ***

(c) (1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or

at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a wavier of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the

notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) * * *

(e) * * *

(f) * * *

3. Principles Governing Removal

As previously admitted by the State of Wyoming, there often is a legitimate basis for permitting removal of state court criminal prosecutions when they involve federal officers. The reason is grounded on the inherent tension in the relationship between the federal and state governments and the supremacy of the federal government in its own sphere. Without the ability to

remove such actions, the federal government would be subject to undue harassment from the states in areas which federal authority is supreme. *See e.g., The Mayor v. Cooper*, 73 U .S. (6 Wall) 247, 253 (1867).

But to recognize that there are important federal interests at stake is not to deny that there are also legitimate and compelling state interests in its enforcement of its own criminal laws no matter who the defendant may be. "Under our federal system, it goes without saying that preventing and dealing with crime is much more the business of the states than it is the Federal Government. Because the regulation of crime is pre-eminently a matter for the states, we have identified a strong judicial policy against federal interference with state criminal proceedings." *Mesa v. California*, 489 U.S. 121, 138 (1989); quoting *Arizona v. Manypenny*, 451 U.S. 232, 243 (1981).

Congress clearly enacted the removal statutes to serve the interest of the federal government in situations involving actions against federal employees and agents under clearly defined situations. However, they have been designed with procedural protections to respect the interests of the States in maintaining local prosecutions of local criminal violations. Unfortunately, these procedural protections were simply ignored in this case, causing prejudice to the prosecution.

4. Standards for Removal

Removal, under the case law, is appropriate when the charge is brought against a federal officer for conduct performed under color of his office and for

which the officer raises a colorable federal defense. This is true despite the fact that no requirement of a "federal defense" is contained in the removal statutes. *Mesa v. California*, 489 U.S. at 125-134 (1989). For purposes of removal, however, the burden is on the defendant. He must show that there is evidence which would support the required elements for removal, but he is not required to establish those elements as a matter of law prior to removal. *Arizona v. Manypenny*, 451 U.S. 232, 234-236, 242 (1981). Thus, a federal employee, officer or agent, who is a criminal defendant in a state prosecution is given the benefit of the doubt on any of the necessary elements when the issue under consideration is, whether or not the criminal prosecution should be removed to federal court. But as is discussed *infra*, that same benefit of doubt does not extend to the determination of the actual existence of the federal defense, in this case immunity.

5. Application of Removal Statutes to This Case

From a procedural and statutory standpoint, at the time the State of Wyoming filed its motion to vacate the removal, it is clear that the order granting removal was improper. Under the provisions of the removal statutes, the district court, if it did not summarily remand the matter to state court for failing to come within the provisions of the statute, was required to hold an evidentiary hearing. 28 U.S.C. § 1446(c)(5). Respondents simply argued that no evidentiary hearing was required under the circumstances in this case. App., *infra*, 50.

Surprisingly, yet clearly to the State of Wyoming's detriment, the district court became confused during the proceedings whether the evidentiary hearing was to be conducted in state court or federal court, and therefore presumably, simply chose not to conduct the hearing. App., *infra*, 49-50. This is true, despite the fact the State only requested the hearing in federal court as the statute clearly implies. Even though the court of appeals acknowledged this case deals with a seldom litigated corner of constitutional law, (App., *infra*, 2), the State of Wyoming should not be prejudiced by a federal district court's confusion on federal statutory language that the court of appeals ruled was "unequivocal". App., *infra*, 30.

Furthermore, the district court relied on *New York v. Tanella*, 239 F. Supp. 2d 291, 295 (E.D.N.Y. 2003), for the proposition that where no disagreement as to the facts relevant to the Court's determination of the removal issue exist, then no evidentiary hearing is required. App, *infra*, 63. Whether again driven by confusion or not, this reliance was prejudicial to the State of Wyoming, since *Tanella* was clearly not relevant on this issue. It is undisputed that the court in *Tanella* offered the prosecution an evidentiary hearing in accordance with law, which was declined, as the state had grand jury testimony on which to proceed. *New York v. Tanella*, 374 F.3d 141, 146 (2d Cir. 2004). In the present case, the State of Wyoming pleaded verbally and by motion for an evidentiary hearing and was denied.

Wyoming raises this issue because of what it sees as the absolute prejudice arising out of the

combined hearing held on June 30, 2004, and the district court's ultimate decision on the Respondents' motions to dismiss, which were based on immunity. The court of appeals erred in allowing the district court to become a fact finder during this motion hearing when it granted the Respondents immunity, and further erred in allowing the district court to do so on such shallow information in the infancy of a criminal prosecution. Issues were clearly in dispute on immunity and that was the limited sole function of the district court in considering a routine Rule 12(b)(2), FED. R. CRIM. P. motion. Issues of immunity will be discussed by the State, *infra*.

The court of appeals, although in error on the ultimate issue of the prejudicial effect on refusing the evidentiary hearing, clearly understood the importance of the hearing in future removal cases and even admonished the district courts.

> "We do urge district courts when facing a motion for removal under §1442 (a) (1) to ensure that the State has an adequate opportunity to identify any disputed issues of fact relevant to removal, and to conduct an evidentiary hearing to resolve them, before acting on the motion." App., *infra*, 33.

The court of appeals acknowledged that the evidentiary hearing is critical to the proceedings since the hearing can resolve disputed issues of fact, facts in this case that the State of Wyoming could have used to substantiate or alleviate ultimate issues on immunity. Certainly, the State is entitled to have the beneficial

use of any facts or evidence gathered at the evidentiary hearing to contest issues of immunity during that argument. However, to then decide as the court of appeals did, that to reverse and remand for an evidentiary hearing would be "a colossal waste of time and resources" (App., *infra*, 32), goes against the very precedence of this Court. A colorable federal defense must be made for removal. *Mesa*, 489 U.S. at 136. In the present case, that defense was immunity, which was clearly before the district court at the removal stage. Therefore, the unequivocal language mandating an evidentiary hearing cannot be ignored.

In support of this contention, this Court, in *Colorado v. Symes*, 286 U.S. 510 (1932), citing *Maryland v. Soper*, (No. 1) 270 U.S. 9 (1926), when discussing the statutory predecessor to the current removal statutes, made clear that a full disclosure of the facts is necessary so that the courts may be fully advised and states may take issue by motions to remand. *Id.* at 519.

To condone the removal procedures followed in this case, is to believe that it is neutral and unprejudicial to force a Wyoming county prosecutor into federal court, under federal procedures to try his criminal case solely on affidavits, including those of the criminal defendants themselves, without the benefit of any witness testimony, cross-examination or rebuttal testimony. The State of Wyoming submits this is fundamentally defective to the criminal justice system we have come to know, expect and demand. The record before the court of appeals made it clear that there were obvious issues in dispute regarding

the facts on removal, particularly when they necessarily blend with issues concerning immunity.

B. The court of appeals erred in affirming the district court's order that immunity was proper

1. Basis of the Defense

While there is interplay between the removal statutes and the immunity defense in this case, to properly apply both, care must be taken to differentiate between them. The removal statutes are designed to provide a federal defendant with what is believed to be a more neutral forum for determining his guilt or innocence. *See e.g., The Mayor v. Cooper*, 73 U.S. at 253. The defense of sovereign immunity, however, provides if established, an absolute defense to a federal actor who would otherwise be subject to state criminal sanctions. *In re Neagle*, 135 U.S. 1, 75 (1890). The defense is not provided because of any desire on the part of the federal government to protect its employees or agents who willfully violate criminal statutes, be they state or federal statutes. Rather, it is a recognition that, if the federal government is going to be supreme in its areas of operation, its employees and agents cannot always be held accountable to state criminal penalties for actions taken in compliance with their duties and obligations as federal officers or agents. *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 263 (1879). When the elements of the defense are present, a federal actor is immune from state prosecution. That being said, however, immunity, like removal has never been held to be *carte blanche*,

freeing federal employees and agents from all the consequences of their actions.

2. Standard

The test applicable to immunity is well established and perhaps best set out by the Second Circuit in *New York v. Tanella,* 281 F. Supp. 2d 606, 612 (E.D.N.Y. 2003), *aff'd*, 374 F.3d 141, 148 (2d Cir. 2004), which involved a drug enforcement agent charged in state court with murder. After being removed to federal court, the defendant asserted the defense of immunity to the charge through a Rule 12(b), FED. R. CRIM. P. motion. On appeal, the state challenged the lower court's application of the test for immunity claiming that both the subjective and objective elements contained questions of fact precluding granting of the motion to dismiss. The Second Circuit stated that the standard of review in such instances is as follows:

> In reviewing this matter, we view the evidence in the light most favorable to the State and assume the truth of the allegations in the indictment. See *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n. 16, 96 L. Ed. 367, 72 S. Ct. 329 (1952); *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984). However, we are mindful that once a threshold defense of immunity is raised, the State bears the burden of "coming forward with an evidentiary showing sufficient at least to raise a genuine factual issue whether the federal officer was . . . doing no more

> than what was necessary and proper for him to do in the performance of his duties." *Long*, 837 F.2d at 752. Moreover, the State cannot meet its burden "merely by way of allegations. [**19] " *Id.*; *see also City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002) (stating that when a "*Supremacy Clause* immunity defense [is raised] by way of motion to dismiss, the district court should grant the motion in the absence of an affirmative showing by the state that the facts supporting the immunity claim are in dispute").

New York v. Tanella, 374 F.3d at 148

3. Elements of the Defense of Immunity

Immunity of federal agents operating within the scope of their authority has been recognized and applied by many courts. Long ago, this Court set out the "necessary and proper" test for such immunity in the case of *In re Neagle*, 135 U.S. 1, 75 (1890):

> "[I]f the [federal officer] is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as [a federal officer] of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State ..."

The "necessary and proper" language has been applied by the federal courts in numerous cases and has evolved into a two-part test: (1) whether the federal agent was performing an act which he was authorized to do by federal law; and (2) in performing such an authorized act, whether the federal agent did no more than what was necessary and proper. *Kentucky v. Long*, 837 F.2d 727, 744 (6th Cir. 1988). In determining whether the agent did no more than "what was necessary and proper," the courts consider two separate elements: (1) whether the agent subjectively believed that his actions were authorized; and (2) whether this belief was objectionably reasonable. *Id.* at 745.

The court of appeals erred when it held that the district court properly applied that test when it granted, with prejudice, Respondents' motions to dismiss, thereby precluding any subsequent prosecution of the offenses charged.

4. Respondents Did Not Satisfy the Elements of Sovereign Immunity so as to be Entitled to a Dismissal under Rule 12(b), FED. R. CRIM. P.

Even should this Court determine that removal was proper, whether or not the Respondents were entitled to a dismissal of the charges brought against them by the State of Wyoming depends upon the proper application of Rule 12(b)(2), FED. R. CRIM. P. That provision states: "A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue."

Without argument, the removal statutes require an evidentiary hearing prior to the entry of an order actually removing the matter from state court to federal court. However, the Respondents were required to show a colorable federal defense. *Arizona v. Manypenny*, 451 U.S. at 234-236, 242. In respect to that showing, the Respondents were entitled to the benefit of contested issues of fact since to require a defendant to establish conclusively his right to the defense prior to removal would be to deny, in many instances, the federal agent of the benefit of that very same defense. *Id.*

However, once the right to removal has been determined by the court, and the question turns to a defendant's motion to dismiss, the presumption changes. The State of Wyoming is required to come forward with evidence, which raises a material issue of fact concerning the validity of the supremacy defense. *Tanella* at 148. Once the State has come forward with evidence as to the defense of immunity, it is the State which is entitled to all reasonable inferences therefrom and that evidence is to be viewed in the light most favorable to the state. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343, n. 16 (1952); *Tanella*; *Morgan v. California*, 743 F.2d 728, 733 (9th Cir. 1984). If there are contested facts which are material to that defense, the defendant is not entitled to a dismissal of the charge under Rule 12(b), FED. R. CRIM. P. *Morgan*, 743 F.2d at 733.

5. Material Questions Existed as to the Objectively Reasonableness of Respondents' Actions

As previously stated, the actions of the defendant must be "objectively reasonable." *Kentucky v. Long*, 837 F.2d at 745. Once again, to determine whether the district court correctly determined that the Respondents' beliefs were "objectively reasonable," it is the evidence presented and relied upon by the State of Wyoming which must be considered. *New York v. Tanella*, 374 F.3d at 148. Despite the fact that the State's evidence was limited by the denial of the evidentiary hearing, the State still supplied the necessary evidence on this issue. The State of Wyoming's response to Respondent Jimenez' motion to dismiss (App., infra, 83a-83n), which was before the district court, clearly identifies issues and facts in dispute.

The facts before the district court and the court of appeals, in the light most favorable to the State of Wyoming showed the following: When confronted by the landowner, Respondents were on private property, along with several drugged wolves. App., *infra*, 8, 48. One of those wolves had been drugged and Respondent Jimenez had traveled a quarter mile onto private property to retrieve the animal. App., *infra*, 8-9. Five wolves had been drugged that day and according to the GPS recordings all were drugged on private property belonging to the Larson Ranch Company. App., *infra*, 6, 84-88. Although Respondents declared by affidavit that the maps they checked indicated that the wolves located on February 13, 2004, the day before the trespass, were on government land, all of the wolves

were subsequently taken on private property. App., *infra*, 6; 88. Although the Respondents admitted that map reading became impossible due to the wind rushing through the helicopter, the district court never inquired and the State was precluded from inquiring into who could have been reading maps during the mission. The State contends no one could have been reading maps, as the pilot was flying, Respondent Jimenez was operating the net gun and Respondent Livingston was operating the dart gun. App., *infra*, 47-48. Nevertheless, the district court and the court of appeals, without hesitation, relied on the criminal defendants' affidavit statements on this issue. *Id.*; App., *infra*, 6-7.

The United States Attorney's Office for the District of Colorado supplied photographs to the State taken at the scene where the Respondents were discovered on private property by the landowner. App., *infra*, 85-86. They show the nearby presence of a ranch house, and a fence line less than one hundred fifty yards from where the Respondents were discovered. Nevertheless, Respondent Jimenez submitted an affidavit stating he saw no fences, cattle, notices of private property or other postings at the site. App., *infra*, 7. Furthermore, the State submitted photos clearly indicating the nature of the land being private property. App., *infra*. 85-86. Based on the foregoing evidence, there were clear material questions of fact as to whether Respondents' "subjective belief" that they were on public land was "objectively reasonable." The State contends that in its analysis of the evidence, the lower courts improperly weighed the circumstances and did not give to the State the benefit

of the reasonable inferences that arose out of that evidence as the law clearly demands they must.

In its decision, the district court and court of appeals even dismissed the importance of the GPS coordinates indicating that they did not show that these were necessarily the places where the Respondents landed, where the wolves were taken, or any activities of Respondents. App., *infra*, 41; 71-72. The evidence, however, was that there were five individual locations recorded by the GPS. There were five wolves taken that day. All five locations were on private property, and the Wyoming Attorney General's Office investigator stated his investigation with a witness revealed the GPS coordinates were "locked" into the GPS system during the wolf capture mission indicating that a "wolf incident" had in fact occurred at that exact location. App., *infra*, 84. The Respondents themselves stated that of the five wolves, four were "net gunned." App., *infra*, 7. The procedure described suggests that when wolves are "net gunned" the net covers them and they go down at that point. The information before both courts was that all of these points were located on private property. A rational, reasonable inference from this evidence is that the GPS correctly noted the four locations where the four wolves were "net gunned", that these locations were all on private property, and that these were the locations where Respondents landed, without regard to the rights or concerns of the private property owners.

Furthermore, the fifth wolf's capture, as described by Respondent Jimenez, involved a dart and harassment of the wolf to a point where the helicopter could safely land. App., *infra*, 7. Again, he stated he

walked uphill to the wolf's location and retrieved him. *(Id)*. In actuality, this is where he walked a quarter mile onto private property to recover the wolf. App., *infra*, 8-9.

Thus, all five of the wolves captured on February 14, 2004, based on the evidence before both courts and the reasonable inferences from that evidence, were taken on private property, contrary to the interpretation of this evidence given by the district court and affirmed by the court of appeals.

However, the district court concluded that the evidence indicating the area where the wolves were off-loaded was private property was "equally equivocal." App., *infra*, 71-72. What the Court did not apparently consider was the admission by Respondent Jimenez that had he seen the signs and other matters when he was there, he would have considered the area to be private property. App., *infra*, 86. Also, more importantly, the photos before the district court and court of appeals clearly showed a ranch house and fence visible from the location where the Respondents were caught trespassing, contrary to the Respondents' affidavits stating no indications of private property were visible from that location.

In this case, the Respondents accessed the property by helicopter. In such situations, it is reasonable to require of individuals more care in their actions than in cases of ground transportation. A private landowner is not likely to post signs warning air travelers of the restricted nature of their property. Objectively, an individual should be required to exercise additional caution to respect the rights of

others. The court of appeals simply concluded that to require federal officers to determine private property boundaries that they might encounter during wolf capture missions would be an "onerous burden". App., infra, 39-40. The State of Wyoming contends this idea violates not only the Constitution of the United States, which protects private property from governmental interference, but also the trespass laws of most, if not all states.

Federal employees cannot legally or summarily trespass at their leisure, and it is never "necessary and proper" for them to do so repeatedly over a several hour period at the expense of private property interests, when their only goal is to place radio collars on wolves.

It is also evident that the issues presented to the district court and court of appeals were obscured by considerations other than the nature of the charges brought against the Respondents. The district court stated: "This type of case is not a particularly well-suited vehicle for challenging the federal government's wolf recovery program as a whole." App., *infra*, 73. The court of appeals, also caught up in the moment, stated:

> "The record evidence supports the suspicion that the prosecution of Mr. Jimenez and Mr. Livingston was not a bona fide effort to punish a violation of Wyoming trespass law..., but rather an attempt to hinder a locally unpopular federal program. An early grant of immunity reduces the risk that the

> possibility of state criminal prosecution will deter the performance by federal officers of their federal duties."

App., *infra*, 44.

Neither 28 U.S.C. § 1442, nor any other federal law allows for "an early grant of immunity", but that is precisely what occurred in this case. Immunity, if granted by a court, must be awarded in accordance with the law.

Both lower courts relied, without hesitation, on the affidavits of the Respondents, both criminal defendants, without affording the state any opportunity to overcome assertions in those affidavits by way of direct witness testimony, cross-examination, or rebuttal witness testimony. There is great irony in the court of appeals speaking repeatedly of the "evidence" in this case, yet no evidentiary hearing was held. App., *infra*, 17, 33, 39, 40, 42-44. A criminal prosecution is born merely with probable cause, and in this case, the State of Wyoming was forced to persuade both courts of its case in chief with that very limited information.

While the district court's conclusion that a fact finder could determine that the actions of the Respondents were "objectively reasonable," that was not the issue before the court. The district court was not in the position of fact finder, yet became one. Rather, under Rule 12(b), FED. R. CRIM. P., the test presented is the narrow question of whether the evidence presented by the State of Wyoming raised a

question of material fact as to the "objective reasonableness" of the actions of the Respondents.

Based on the foregoing analysis, it is clear that material questions of fact did exist as to the "objective reasonableness" of the Respondents' belief that they were on public property, when all of the facts presented by the State on this matter, suggest they had to know they were on private property. The decision of the court of appeals affirming the district court in dismissing the charges against the Respondents, was in error.

It is clear that both courts saw the prosecution in this case as one based upon federal enforcement of an unpopular federal mission, the reintroduction of wolves to Wyoming. Whether or not wolf reintroduction into Wyoming is popular was not and is not at issue in this matter. Respondents filed motions to dismiss based upon immunity, not selective prosecution. The evidence, untainted by prejudicial references to the State regarding wolves, is what must be considered in determining whether or not the district court and the court of appeals were justified in their conclusions. Based on the evidence presented by the State of Wyoming, viewed in a light most favorable to it, there were material questions of fact concerning any objective reasonableness of Respondents' belief that their actions were nothing more than that permitted as agents of the federal government. Because this is true, the decision of the court of appeals was in error. The simple granting of the evidentiary hearing as required by law in this case was necessary for the determination of both issues, since removal and immunity are of a blended sort. The

Respondents, both criminal defendants, should not be allowed to benefit from the errors in disallowing the evidentiary hearing. The hearing, without question, would have assisted in the development of the facts and disputed issues, and would have played an integral role in the ultimate determination of immunity.

The State of Wyoming merely wants its proper day in court as is afforded to any defendant in this Country. If the federal government is going to remove cases to federal court under federal procedures to gain federal immunity, then the federal government must be expected to follow federal law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

Bryan A. Skoric
Counsel of Record
Park County and Prosecuting Attorney's Office
State of Wyoming
1002 Sheridan Avenue
Cody, Wyoming 82414

Counsel for Petitioner

APPENDIX

TABLE OF CONTENTS

Appendix Page

Opinion of
The United States Court of Appeals
for the Tenth Circuit
filed April 6, 2006 1

Order of
The Honorable Alan B. Johnson
Re: Denying Defendants' Motions to
Vacate Order of Removal of
Criminal Prosecution and
Granting Defendants' Motions to Dismiss
filed July 16, 2004 45

Order on Removal of
The Honorable Alan B. Johnson
Re: Wesley O. Livingston
filed May 10, 2006 75

Order of Removal of
Criminal Prosecution Pursuant to
28 U.S.C. § 1442(a)(1) of
The Honorable Alan B. Johnson
Re: Michael D. Jimenez
filed May 7, 2006 78

28 U.S.C. § 1442(a)(1) 80

28 U.S.C. § 1446 81

Plaintiff's Response to Defendant
Jimenez's Motion to Dismiss,
With Exhibit,
filed June 15, 2006 .....83a

Exhibit:

Declaration of
Special Agent Steve Herrmann,
With Attachment,
dated June 14, 2004 84

Attachment:

A. Map.....88

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[FILED April 6, 2006]

STATE OF WYOMING,
Plaintiff-Appellant,

v.

Nos. 04-8085
& 04-8087

WESLEY O. LIVINGSTON,
Defendant-Appellee.

STATE OF WYOMING,
Plaintiff-Appellant,

v.

MICHAEL DAVID JIMENEZ,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D.C. NO. 04-CR-98J and 04-CR-103J)

Bryan A. Skoric, Park County and Prosecuting Attorney, Cody, Wyoming for Plaintiff-Appellant State of Wyoming.

Michael S. Messenger, Messenger & Jurovich, P.C., Thermopolis, Wyoming for Defendant-Appellee Livingston.

Michael C. Johnson, Assistant United States Attorney (John W. Suthers, United States Attorney for the District of Colorado, with him on the brief), Denver, Colorado for Defendant-Appellee Jimenez.

Before **O'BRIEN**, **McCONNELL**, and **ANDERSON**, Circuit Judges.

McCONNELL, Circuit Judge.

This case involves a seldom-litigated corner of the constitutional law of federalism known as Supremacy Clause immunity. Supremacy Clause immunity governs the extent to which states may impose civil or criminal liability on federal officials for alleged violations of state law committed in the course of their federal duties. These disputes permit of no easy answers, because while state criminal law provides an important check against abuse of power by federal officials, the supremacy of federal law precludes the use of state prosecutorial power to frustrate the legitimate and reasonable exercise of federal authority. The doctrine has played a part in some of the most dramatic clashes between states and the federal government in U.S. history, such as Mississippi's prosecution of a federal marshal for breach of the peace for using tear gas to control riots erupting over the admission of the first African

American student to its state university;[1] California's prosecution of a federal marshal for killing a former justice of the state supreme court who he thought was about to assassinate Supreme Court Justice Stephen Field;[2] and, more recently, Idaho's prosecution of a federal agent for killing an unarmed woman (and a pet dog) in connection with the notorious raid on a cabin at Ruby Ridge.[3] This case involves the highly charged issue of federal reintroduction of wolves in Wyoming. The question is whether the State may prosecute the federal agent in charge of the wolf reintroduction program and a federal contractor assisting him for alleged violations of the Wyoming laws against trespass and littering, when the defendants unknowingly entered private property in the course of tranquilizing and installing collar monitoring devices on wolves that had strayed from their proper territory.

I. Background

In 1995, decades after the native population of gray wolves disappeared from Wyoming, the United States Fish and Wildlife Service ("USFWS") embarked on a program of reintroduction of the animal to the State. Not surprisingly for a State

---

[1] *In re McShane's Petition,* 235 F. Supp. 262 (N.D. Miss. 1964).

[2] *In re Neagle,* 135 U.S. 1 (1890).

[3] *Idaho v. Horiuchi,* 253 F.3d 359 (9th Cir. 2001) (en banc), *vacated as moot* 266 F.3d 979 (9th Cir. 2001) (en banc).

heavily dependent on livestock for its economic well-being, the decision to reintroduce wolves met with vehement local opposition, which is well documented in the record. The USFWS recognized that the success of the reintroduction program would depend, in large measure, on its ability to control livestock predation by the reintroduced wolves. The USFWS uses radio telemetry to monitor and manage the wolves. USFWS staff capture the wolves and outfit them with radio collars, which reveal the location of wolf packs to the USFWS and enable the agency to use radio-signaled light and siren scare devices to harass the wolves away from livestock and back to their designated territory. The USFWS also provides the radio frequencies to local ranchers to alert them when wolf packs are near.

Radio collaring wolves is not an easy process. Typically, a fixed wing aircraft spots a wolf pack and ascertains whether any members of the pack lack collars. If so, the pilot directs a helicopter team to the pack. When the pack hears the helicopter, the wolves have a tendency to disperse in all directions. The helicopter pursues the wolves at low altitude to enable the gun operator to fire a tranquilizer dart at a wolf from a distance of less than twenty yards. Once struck by a dart, a wolf can still travel up to a mile before the tranquilizer takes effect. This, along with the initial dispersion, means that collaring operations can be spread over several square miles. When practicable, the helicopter will land to pick up each immobilized wolf and take it to a central place where it can be processed with other wolves; however, if landing is not possible, a team member will hike to the wolf and either carry it to the central

location or process it on the spot. The tranquilized wolves require close attention. The tranquilizers prevent the wolves from effectively regulating their body temperature, so capture teams have to move the wolves into open or shady areas as conditions dictate. The wolves also have trouble closing their eyes and regulating incoming light while under effect of the drugs.

Defendant Michael David Jimenez, Appellee in No. 04-8085, has been the project leader of the USFWS Wyoming Wolf Recovery Project since 1999. His prior experience includes participation in a capture team that radio collared 47 wolves in Yellowstone Park and supervision of a team that radio collared another 28 wolves. Defendant Wesley O. Livingston, Appellee in No. 04-8087, an experienced wolf handler, was an employee of Hawkins and Powers Aviation, Inc. working with Mr. Jimenez as a federal contractor to support the wolf monitoring program.

On February 13, 2004, a fixed wing aircraft spotted the Washakie pack, a troublesome group of gray wolves, near Meeteetse, Wyoming, far outside their normal range. This Court is familiar with the Washakie pack on account of earlier litigation in which Wyoming ranching interests sought to compel the USFWS to undertake greater efforts to control the pack. *See Gordon v. Norton,* 322 F.3d 1213, 1215 (10th Cir. 2003). The core of the Washakie pack's territory is north of Dubois, Wyoming in the Dunoir Valley. It is difficult for the USFWS to control the pack through helicopter operations in the Dunoir Valley because of rugged terrain, extensive forest

cover, and frequent windy conditions. The spotting of the pack outside of its normal range presented an opportunity to collar the wolves. Mr. Jimenez sought and received authorization from his supervisor, Edward Bangs, to begin a capture operation. On February 14, 2004, Mr. Jimenez, Mr. Livingston, and a helicopter pilot began the operation.

In accordance with USFWS procedure, it was Mr. Jimenez's practice to secure permission from land owners if he thought he would need to go on private land. Of the members of the capture team, Mr. Jimenez was least familiar with the Meeteetse area. Before the helicopter flight, Mr. Jimenez spoke with the fixed-wing pilot and the helicopter pilot; they both indicated their belief that the wolves were located on federal land managed by the Bureau of Land Management (BLM). The area in which the wolves were spotted is a jumble of federal, state, and private land; it is difficult from the air (and often from the ground) to determine the ownership of the land, even with the assistance of maps. Determining the ownership of the land during the operation was all the more difficult because the doors of the helicopter were removed to allow operation of the dart and net guns; this made map reading impossible during flight because of the wind blowing through the helicopter. The helicopter was equipped with a global positioning system (GPS) that allowed the pilot to lock in coordinates whenever a dart or net was fired. Later examination of GPS coordinates indicated that, at the time when darts or nets were discharged from the helicopter, the target wolves were on private land.

The operation successfully captured and collared five wolves. One wolf was net gunned, physically restrained, radio collared, and released. Three wolves were net gunned and then immobilized with darts and another wolf was darted on a rocky slope where it was unsafe to land. The helicopter harassed this last wolf down a hill toward a gravel road where it was safe for the helicopter to land. After dropping Mr. Jimenez off on the road, the helicopter went to retrieve the three other darted wolves. Mr. Jimenez walked up a hill to retrieve the immobilized wolf. He carried this wolf down the slope to a shaded patch of snow near the road. Later examination by state surveyors revealed that this spot was outside the county road right of way, on private land owned by the Larsen Ranch. The helicopter returned with the three other wolves, which Mr. Jimenez and Mr. Livingston moved to the patch of snow where the other darted wolf had been deposited. At this point the helicopter left to refuel while Mr. Jimenez and Mr. Livingston examined the wolves for injuries, took blood samples, and placed radio collars on them. The wolves were released. A monitoring flight on February 19, 2004 revealed that the Washakie pack had traveled about 15 miles southwest of the processing spot; by March 4, 2004 the pack had returned to its traditional range in the Dunoir Valley.

In his declaration, Mr. Jimenez states that there were no fences, cattle, notices of private property, or other postings at the site where he and Mr. Livingston processed the wolves. He states that he was not familiar with the road and no one had

informed him that the area adjacent to the road was private property. As Mr. Jimenez and Mr. Livingston were attending to the wolves, Randy Kruger, a shareholder and employee of the Larsen Ranch Company, owner of the property, drove up the road. He stopped his vehicle and asked Mr. Jimenez what he was doing. Mr. Jimenez explained his purpose. Mr. Kruger never informed Mr. Jimenez that he was on private land and never asked Mr. Jimenez to leave Larsen Ranch property or to remove the wolves from ranch property. Mr. Kruger had a camera and took several photographs of Mr. Jimenez and the wolves, which appear in the record. After an apparently amicable conversation, Mr. Jimenez and Mr. Kruger shook hands before Mr. Kruger departed.

On March 2, 2004 Special Agent Steve Herrmann of the Wyoming Division of Criminal Investigation began investigating allegations by Mr. Kruger that Mr. Jimenez and Mr. Livingston had trespassed on Larsen Ranch land during the capture operation. As part of this investigation Mr. Herrmann met with a Park County Engineer and a Park County Works Department Project Manager to survey the site of the encounter to determine whether Mr. Jimenez and Mr. Livingston had been on private land during the operation. The road, Park County Road 4 CP, has a sixty foot right of way. The survey indicated that in two of the photographs taken by Mr. Kruger, Mr. Jimenez was on Larsen Ranch land. Interviews with Mr. Jimenez and Mr. Livingston confirmed the general outlines of Mr. Kruger's allegations and also revealed that Mr.

Jimenez had walked approximately one quarter mile north of the road to retrieve a darted wolf.

On April 16, 2004, the State of Wyoming filed separate Misdemeanor Informations in the Park County Circuit Court alleging that Mr. Jimenez and Mr. Livingston violated Wyoming Statute § 6-3-303(a), which prohibits knowingly entering the land of another without authorization, and Wyoming Statute § 6-3-204(a), which prohibits littering by placing or depositing objects on the property of another. Mr. Livingston appeared before the Circuit Court on May 11, 2004. Mr. Jimenez never appeared before the Circuit Court. Mr. Jimenez filed a notice of removal in the United States District Court for the District of Wyoming on May 4, 2004. The district court entered an order of removal pursuant to 28 U.S.C. § 1442(a)(1) on May 7, 2004. On May 10, 2004, Mr. Livingston filed a notice of removal with the district court and the court entered an order of removal pursuant to 28 U.S.C. § 1442(a)(1) on the same date.

The State of Wyoming filed motions to vacate the orders removing the prosecutions. In both motions, the State argued that the federal court did not have jurisdiction because the Defendants had not been arraigned and that removal was improper because the district court did not hold an evidentiary hearing, as required by 28 U.S.C. § 1446(c)(5). On May 27, 2004, Mr. Jimenez filed a motion to dismiss, asserting that because federal law authorized his actions he was entitled to immunity under the Supremacy Clause of the Constitution. On June 8, 2004, Mr. Livingston filed a motion to dismiss,

arguing that because he was acting at the authorized direction of a federal officer, he was similarly immune from prosecution under the Supremacy Clause. On June 30, 2004, the district court held a combined hearing on the motions to vacate removal and the motions to dismiss. On July 16, 2004, the district court issued an order denying the motions to vacate and granting both motions to dismiss.

The State of Wyoming appeals, raising two arguments. First, it contends that the district court erred by denying the motion to vacate removal because the district court did not hold an evidentiary hearing prior to ordering the removal. Second, it argues that the grant of Supremacy Clause immunity was improper because there were contested issues of fact that were material to whether the actions of the Defendants were necessary and proper to carry out their authorized duties.

Before the district court and at appellate oral argument, Wyoming argued that a grant of Supremacy Clause immunity was inappropriate for Mr. Livingston because he was a federal contractor rather than a federal employee. However, Wyoming did not address this issue in its opening appellate brief. The issue is therefore waived. *See Lifewise Master Funding v. Telebank,* 374 F.3d 917, 927 n.10 (10th Cir. 2004) (noting that an appellant waives the right to appeal any rulings of the district court that it did not address in its opening appellate brief); Fed. R. App. P. 28(a)(9)(A) (requiring that an appellant's brief contain an argument that includes "appellant's contentions and the reasons for them"). Accordingly,

for purposes of this case, we will treat Mr. Livingston as if he were a federal officer.

II. Applicable Law

A. *The Development of Supremacy Clause Immunity*

The framers of the American federal system expected the federal and state governments each to check the abuses of the other. *See* The Federalist No. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he General [*i.e.*, federal] Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. . . . If [the rights of the people] are invaded by either, they can make use of the other, as the instrument of redress."); The Federalist No. 51, at 351 (James Madison) ("In the compound republic of America . . . . a double security arises to the rights of the people. The [state and federal] governments will controul each other; at the same time that each will be controulled by itself."). The flipside of this mutual checking function, however, is the danger that one level of government would improperly restrict the other, and especially that states would impede or frustrate the legitimate execution of federal law. To prevent this second evil, federal officers have long been held immune from state prosecutions for actions reasonable and necessary in the discharge of their federal responsibilities. *See, e.g., In re Neagle,* 135 U.S. 1, 75 (1890); *Ohio v. Thomas,*173 U.S. 276, 284 (1899). This immunity is

rooted in the Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Although the Supremacy Clause explicitly refers only to the "Constitution" and "Laws," its implication is that states may not impede or interfere with the actions of federal executive officials when they are carrying out federal laws. As Chief Justice John Marshall maintained in the great case of *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 436 (1819), "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." It is not necessary for Congress to provide expressly for such immunity in the statutes under which federal officials act; Supremacy Clause immunity is "incidental to, and is implied in the several acts by which these [federal] institutions are created, and is secured to the individuals employed in them, by the judicial power alone." *Osborn* v.

Bank of United States, 22 U.S. (9 Wheat.) 738, 865-66 (1824) (Marshall, C.J.).

The Supreme Court's leading case on Supremacy Clause immunity is *In re Neagle,* 135 U.S. 1 (1890), in which the Court held that a deputy marshal was immune from state prosecution for murder when he killed a man he suspected was about to stab Justice Stephen Field. While Justice Field was riding circuit in 1888, two of the litigants, former California Chief Justice David Terry and his wife, Sarah Terry, erupted in a violent outburst. *Id.* at 44-45. Mr. Terry punched one of the marshals, knocking out his tooth, and then pulled a bowie knife from inside his vest; Mrs. Terry attempted to draw a handgun from her handbag. *Id.* at 45-46. The Terrys were removed from the courtroom and sentenced to prison for contempt of court. *Id.* at 45. Undeterred by their contempt sentence, the Terrys issued threats against Justice Field that were "open, frequent, and of the most vindictive and malevolent character." *Id.* at 46. In response, the Attorney General assigned Deputy United States Marshal David Neagle to accompany Justice Field for his protection on his return to circuit duty in California in 1889. *Id.* at 51-52. Mr. Neagle was given special instructions to "attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by [the] Terry[s]." *Id.* at 52. Justice Field, accompanied by Mr. Neagle, was traveling by railway from Los Angeles to San Francisco when the Terrys boarded the train in Fresno. *Id.* Justice Field was in the dining car when he encountered the truculent couple. *Id.* at 52. Mrs.

Terry left the dining car to obtain a revolver while Mr. Terry assaulted Justice Field with his fists. *Id.* at 52-53. Mr. Neagle pointed his gun at Mr. Terry and cried out, "Stop! Stop! I am an officer!," whereupon Mr. Terry reached into his clothing as if to pull out a weapon. *Id.* at 53. Mr. Neagle shot him twice, killing him instantly. *Id.* It turned out that Mr. Terry had no weapons on his person. *Id.* Mr. Neagle was charged with murder under California law in the County of San Joaquin. *Id.* at 5. While a prisoner awaiting trial, he sought and obtained from the federal court a writ of habeas corpus, which was affirmed by the court of appeals and appealed to the Supreme Court by the Sheriff of San Joaquin County. *Id.* at 3.

The Supreme Court held that Mr. Neagle was entitled to habeas corpus relief because he was acting under authority of the law of the United States, and thus he was "not liable to answer in the courts of California on account of his part in that transaction." *Id.* at 76. As a preliminary matter, the Court held that any defenses Mr. Neagle might have under state law were not relevant to the federal court proceeding. Although "such [defenses] would be a proper subject for consideration on a trial of the case for murder in the courts of the state of California," the Court explained, "there exists no authority in the courts of the United States to discharge the prisoner . . . unless there be found in aid of the defense of the prisoner some element of power and authority asserted under the government of the United States." *Id.* at 54.

The Court then considered whether Mr. Neagle's defense stemmed from the exercise of federal authority. It rejected the argument that Mr. Neagle's conduct was unauthorized because no act of Congress expressly empowered marshals to accompany Supreme Court justices through their circuits, to serve as their bodyguards, and to defend them from assaults. *Id.* at 58. In doing so, the Court explained that it is appropriate to "extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty." *Id.* Ultimately, the Court derived federal power and authority for Mr. Neagle's conduct from the Attorney General's authorization of a detail of marshals to protect Justice Field during his trip to California. *Id.* at 67-68.

After ascertaining that Mr. Neagle was authorized to protect the life of a Supreme Court Justice, the only remaining inquiry was whether he did "no more than what was necessary and proper" to carry out that duty. *Id.* at 75. Given the past behavior of the Terrys, the Court concluded that Mr. Neagle's belief that Justice Field's life was in danger was "well-founded" and his actions "justified." *Id.* at 76. Accordingly, the Court held that it was necessary and proper *for him to* use lethal force against Mr. Terry, and affirmed the grant of habeas corpus. *Id.*

The Court reaffirmed the principles of *Neagle* in *Ohio v. Thomas,* 173 U.S. 277 (1899). An Ohio statute, presumably pressed by dairy farmers, required any establishment serving or using oleomargarine to prominently display that fact on a

large placard. *Id.* at 278. In disregard of this vital labeling law, the eating house at the Central Branch of the National Home for Disabled Volunteer Soldiers impetuously served oleomargarine without advertisement. *Id.* Unwilling to countenance this affront to its laws, the State of Ohio indicted Mr. Thomas, the governor in charge of the eating house. *Id.* at 277. Mr. Thomas was convicted of the offense and the court ordered him imprisoned until he paid a $50 fine; he refused to pay, and instead filed a writ of habeas corpus in the Southern District of Ohio, which the court granted. *Id.* at 280. The Sixth Circuit affirmed and Ohio appealed to the Supreme Court. The Court affirmed on the grounds that the eating house was a federal facility and Mr. Thomas had authorization from the Secretary of War to serve oleomargarine to his charges. *Id.* at 282. This holding gives grants of federal authority a generous sway. Mr. Thomas was not prosecuted for serving oleomargarine, but for failing to notify patrons he was doing so. This requirement was not incompatible with Mr. Thomas's federal authorization to serve oleomargarine; Mr. Thomas could have complied with the state law without shirking his federal duty. Nevertheless, the Court concluded that the grant of federal authority was sufficient not only to permit serving oleomargarine, but to prevent Ohio from regulating the manner and circumstances of service as well.

In both *Neagle* and *Thomas* it was apparent that the federal officers had acted reasonably in discharging their duties. However, in *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906), the Court was confronted with the question whether

Supremacy Clause immunity applies when it is unclear whether officers acted reasonably. *Drury* involved a state prosecution of two soldiers charged with murdering a civilian. *Id.* at 2. The soldiers claimed that the shooting was lawful because the suspect was in flight; witnesses testified that the soldiers had shot the victim after surrender. *Id.* at 3-4. A federal circuit court refused to grant a writ of habeas corpus to the soldiers at an early stage in the litigation. *Id.* at 6. The Court affirmed, noting that only "exceptional" cases warrant exercise of the "exceedingly delicate" jurisdiction of federal courts to usurp state prosecutions, and finding that the circuit court properly exercised its discretion not to issue the writ in advance of trial given the conflicting evidence about whether the killing was lawful. *Id.* at 7-8.

The contrast between *Lewis* and *Neagle* clarifies the key inquiry in early Supremacy Clause immunity cases: given the undisputed facts of a case, was the federal officer reasonably discharging his authorized federal duties? If so, then a grant of habeas corpus is appropriate in advance of trial. If not, then the state court prosecution may proceed, leaving as recourse a post-conviction habeas petition if the result is adverse.

B. Supremacy Clause Immunity Doctrine in the Lower Federal Courts

The Supreme Court has decided no Supremacy Clause immunity case since 1920. *See Johnson v. Maryland,* 254 U.S. 51 (1920). Modern Supremacy Clause immunity doctrine has thus

largely been developed in the lower federal courts. In *Clifton* v. *Cox,* 549 F.2d 722, 724 (9th Cir. 1977), the Ninth Circuit considered whether a special agent for the Bureau of Narcotics and Dangerous Drugs was entitled to immunity for a killing that occurred during a drug raid. After finding that the federal agent's acts were within the scope of his authority, the court went on to consider whether the agent's conduct "was necessary and proper under the circumstances." *Id.* at 728. The Ninth Circuit explained the "necessary and proper" standard as follows:

> Determination of whether petitioner's shooting . . . was necessary and proper . . . must rest not only on the subjective belief of the officer but also on the objective finding that his conduct may be said to be reasonable under the existing circumstances. Proper application of this standard does not require a petitioner to show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be.

Id. The Ninth Circuit incorporated a subjective element into the "necessary and proper" analysis. It explained that "'if . . . petitioner shows . . . that he had an honest and reasonable belief that what he did was necessary in the performance of his duty . . . then he is entitled to the relief he seeks.'" *Id.* at 729 (quoting *In re McShane's Petition,* 235 F. Supp. 262, 274 (N.D. Miss. 1964)).

In *Kentucky v. Long,* 837 F.2d 727 (6th Cir. 1988), the Sixth Circuit framed the Supremacy Clause immunity analysis in a similar fashion. The court explained:

> [A] two-part test determines whether or not a state court has jurisdiction to prosecute a federal agent for conduct facially violative of a state's criminal code. Under *Neagle,* a state court has no jurisdiction if (1) the federal agent was performing an act which he was authorized to do by the law of the United States and (2) in performing that authorized act, the federal agent did no more than what was necessary and proper for him to do.

Id. at 744. As to whether an act was "necessary and proper," the Sixth Circuit, citing *Clifton,* stated that a federal officer must "only show that he reasonably thought it to be necessary and justifiable." *Id.* at 745. The court also included *Clifton's* subjective element, which requires the agent to "have an honest belief that his action was justified." *Id.* The Second Circuit has adopted a similar approach. *See New York v. Tanella,* 374 F.3d 141, 147 (2d Cir. 2004); *Whitehead v. Senkowski,* 943 F.2d 230, 234 (2d Cir. 1991) ("[T]he agent must have a subjective belief that his conduct was justified, and that belief must be objectively reasonable.").

Although we agree with the general Supremacy Clause immunity analysis set forth in *Clifton* and *Long,* we are hesitant to adopt the

"necessary and proper" label as it may engender unnecessary confusion with the familiar Necessary and Proper Clause of Article I, Section 8, Clause 18.[4] The "necessary and proper" language is derived from *Neagle,* where the Court said,

> if the prisoner is held in the state court to answer for an act which he was *authorized to do by the law of the United States,* which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more

---

[4] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), provides the canonical exposition of the meaning of "necessary and proper": "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." This cannot be the definition of Supremacy Clause immunity because it would imply that federal officers are virtually unlimited in their choice of appropriate means (including violation of state law) to carry out federal policy. As the cases demonstrate, that is too broad an understanding of the immunity. While federal officers sometimes are entitled to immunity for violations of state law, this is only where they had an objectively reasonable and well-founded basis to believe that their conduct was necessary for the performance of their federal duties, which entails a more demanding judicial scrutiny of the relation of means to ends than is appropriate under the Necessary and Proper Clause.

> than what was *necessary and proper* for him to do, he cannot be guilty of a crime under the law of the state of California.

In re Neagle, 135 U.S. at 75 (emphasis added). However, the *Neagle* Court also used other language to describe its analysis. In explaining its grant of habeas relief, the Court emphasized that "Neagle was *correct* in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter; [and] that, such being his *well-founded belief,* he was *justified* in taking the life of Terry." *Id.* at 76 (emphasis added). As other circuits have found, the Court in *Neagle* was granting immunity for federal agents who *reasonably* believed that their acts were *necessary* to perform their duties. Because it is equally appropriate and less confusing to label the second part of the Supremacy Clause immunity analysis "reasonable and necessary," we will use that language wherever possible throughout the remainder of this opinion.

We are also concerned with the incorporation of a subjective element into the reasonableness of a federal officer's actions, an element that was not present in the Supreme Court's decisions. The subjective element first appeared in district court decisions in the mid-twentieth century. In *Brown v. Cain,* 56 F. Supp. 56, 58 (E.D. Pa. 1944), and *McShane,* 235 F. Supp. at 274, the courts held that a federal officer must have an "honest[]" belief that his actions are reasonable and necessary to the exercise of his authority. Although most circuit courts have adopted the subjective approach without analysis,

the en banc Ninth Circuit has recently questioned whether inclusion of a subjective component is appropriate in light of the Supreme Court's decision in *Harlow* v. *Fitzgerald,* 457 U.S. 800, 817-18 (1982), which held that qualified immunity should depend on whether the official acted in an objectively reasonable manner, without reference to subjective intentions. *Idaho v. Horiuchi,* 253 F.3d 359, 366 n.11 (9th Cir. 2001) (en banc), *vacated as moot,* 266 F.3d 979 (9th Cir. 2001) (en banc).

Although qualified immunity and Supremacy Clause immunity have different sources and functions, there is a functional similarity between these two doctrines. Both qualified immunity and Supremacy Clause immunity reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation. *See Anderson* v. *Creighton,* 483 U.S. 635, 638 (1987) ("[D]amages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."); *Long,* 837 F.2d at 752 (analogizing Supremacy Clause immunity to qualified immunity and concluding that in both situations, courts have a duty to make early rulings on immunity issues to avoid excessive interference with official actions). Just as the Supreme Court jettisoned the subjective element of the qualified immunity test because it was incompatible with the goal of promptly determining whether qualified immunity was appropriate on a motion for summary

judgment, *Harlow,* 457 U.S. at 815-819, it may also be appropriate to reject a subjective element of the Supremacy Clause immunity test. Nonetheless, because Wyoming does not dispute that both Mr. Jimenez and Mr. Livingston subjectively believed they were on federal land, we need not now decide whether a federal officer's subjective intent factors into the determination of whether an action was reasonable and necessary.

In harmony with the Second, Sixth, and Ninth Circuits, we hold that a federal officer is not entitled to Supremacy Clause immunity unless, in the course of performing an act which he is authorized to do under federal law, the agent had an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties. We leave for another day the question whether that belief must be both subjectively and objectively reasonable.[5]

---

[5] We also leave for another day whether federal officers are entitled to Supremacy Clause immunity where their state law violation was disproportionate to the federal policy they were carrying out - where, for example, they commit a grievous state offense for the purpose of enforcing a trivial federal policy. Wyoming has not argued that its laws against trespassing and littering are so significant that they outweigh the federal interest in wolf monitoring.

C. *Congressional Protection of Federal Actors: Federal Officer Removal Statutes*

Related to the judicially created Supremacy Clause immunity doctrine are federal officer removal statutes. Like Supremacy Clause immunity, federal officer removal statutes are designed to protect the operations of the federal government from state interference. Despite their similarities, the principles are distinct. Supremacy Clause immunity, when properly established, provides an absolute immunity to prosecution. *See Neagle,* 135 U.S. at 75; *Long,* 837 F.2d at 752. Federal officer removal statutes, in contrast, provide federal officers with a federal forum for the entire trial, including determinations of guilt or innocence as well as the applicability of official immunity. This protects against the possibility of a hostile state forum, which might arise when the federal officer is enforcing a locally unpopular national law. *See Willingham* v. *Morgan,* 395 U.S. 402, 407 (1969) ("[O]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court."); *Tennessee* v. *Davis,* 100 U.S. (10 Otto) 257, 263 (1880) ("[The federal government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State . . . the operations of the general government may at any time be arrested at the will of one of its members."). Although early Supremacy Clause immunity cases were based on habeas corpus statutes that provided for a grant of the writ where officers acted under the

authority of federal laws,[6] such cases now usually arise on motions to dismiss after the case has been removed to federal court. *See Long,* 837 F.2d at 730; *Horiuchi,* 253 F.3d at 364; *Tanella,* 374 F.3d at 142. Not all cases involving prosecutions of federal officers, however, permit of removal, *see Mesa v. California,* 489 U.S. 121, 139 (1989), and the history of cases involving federal officer removal statutes demonstrates the circumstances under which removal is appropriate.

Although they have not always taken their present form, federal officer removal statutes have long been a part of this country's history. The first removal provision was enacted as part of an 1815 customs statute, which attempted to enforce, over the opposition of New England states, an embargo on trade with England. *Willingham v. Morgan,* 395 U.S. 402, 405 (1969). The removal statute "allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done 'under colour' of the statute." *Id.* The 1815 removal statute expired at the end of the war, but a new removal statute protecting federal officers who

---

[6] There is one notable exception to this pattern of reviewing grants of habeas corpus. In *Johnson v. Maryland,* 254 U.S. 51, 57 (1920), the Court reversed a Maryland conviction of a post office employee for driving without a Maryland license. In a brief opinion reviewing the conviction on direct appeal, Justice Holmes concluded that immunity was appropriate for the employee and thus the conviction and fine were invalid. *Id.*

were enforcing customs laws was passed in 1833 in response to South Carolina's threats of nullification. *Id.* With the Civil War came other removal statutes, authorizing removal of civil suits and criminal prosecutions arising out of enforcement of federal revenue laws. *Id.* at 405-06.

These early removal statutes were often met with constitutional challenges, based on the theory that the cases did not arise under the Constitution or laws of the United States, and thus were outside the scope of Article III. *Mayor v. Cooper,* 73 U.S. (6 Wall.) 247, 248 (1868), involved civil claims against the mayor and alderman of Nashville, Tennessee (who were appointed under the authority of the President by the then military governor of Tennessee) for trespass and conversion of chattels occurring during or shortly after the Civil War. The federally appointed city officials sought removal to federal court; Cooper opposed, claiming that the removal statute violated Article III of the Constitution. *Id.* at 249. The Court upheld the removal statute's constitutionality, observing that averment of one federal defense was sufficient to confer federal jurisdiction, even if the remainder of the case was premised exclusively on state law. *Id.* at 252-54.

Tennessee v. Davis, 100 U.S. at 262, provided the Court with its first opportunity to consider the constitutionality of removal of state criminal prosecutions. There, the State of Tennessee prosecuted a federal revenue collector for murder. The federal officer claimed that "he was assaulted and fired upon by a number of armed men" while he

was in the act of seizing an illegal distillery, "and that in defence of his life he returned the fire" and killed an assailant. *Id.* at 261. As in *Cooper,* the federal officer sought to remove the prosecution to federal court and the State claimed the removal statute was unconstitutional. In finding that the case "arise[s] under the Constitution or a law or a treaty of the United States," the Court examined whether the case turned on the construction of federal law. *Id.* at 264. The revenue collector's defense was self-defense. The legitimacy of that defense turned on whether the officer had the authority to seize the distillery—a question of federal law. *See id.* at 265; *Mesa,* 489 U.S. at 127-28 (explaining that in *Davis,* "[p]roof that Davis was not a thief depended on the federal revenue laws and provided the necessary predicate for removal"). The early removal statutes at issue in *Cooper* and *Davis* were therefore constitutional because removal was predicated on the existence of a federal defense. *See Mesa,* 489 U.S. at 128-29.

In 1948, Congress extended the early, limited removal statutes to cover all federal officers. *See* Act of June 25, 1948, ch. 646, 62 Stat. 869, 938 (codified as amended at 28 U.S.C. § 1442(a)). The new federal officer removal statute provides, in relevant part:

> A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a). This statute reflects Congress's determination that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Willingham,* 395 U.S. at 407. The Supreme Court has therefore construed the statute as "not 'narrow' or 'limited'" but rather "broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Id.* at 406-07 (quoting *Colorado v. Symes,* 286 U.S. 510,517 (1932)).

Although the language of the statute seems to permit removal of state criminal prosecutions whenever a federal officer is sued or prosecuted for an act under color of his federal office, the Supreme Court has confined the statute to cases where the officer alleges a colorable federal defense for the act. *Mesa,* 489 U.S. at 139. Removal is appropriate, for example, where the federal officer alleges Supremacy Clause immunity as a defense.

III. Discussion

A. *Removal*

Wyoming does not dispute that this case involves a federal officer prosecuted for acts under the color of federal office, nor that Defendants Jimenez and Livingston have colorable federal defenses based on Supremacy Clause immunity. The State does argue, however, that removal was procedurally improper, in that the district court failed to hold an evidentiary hearing prior to denying the State's motion to vacate. The removal statute provides that "[i]f the United States district court does not order the summary remand of [a criminal] prosecution, it *shall* order an evidentiary hearing to be held promptly and *after such hearing* shall make such disposition of the prosecution as justice shall require." 28 U.S.C. § 1446(c)(5) (emphasis added). The district court concluded that an evidentiary hearing is not necessary when there is no dispute about the facts that permit removal. The State argues that this violates the plain text of the statute, and urges this Court to reverse the decision below and remand to the district court with instructions to hold the required evidentiary hearing.

The district court's decision that no evidentiary hearing was required may seem to be commonsensical. There is no need for a court to hold an evidentiary hearing in a matter when there are no material facts in dispute. *Cf. Scrivner* v. *Tansy*, 68 F.3d 1234, 1242 (10th Cir. 1995) ("If no facts are disputed [in a habeas petition] and the issues can be resolved on the basis of the record and the law, no

evidentiary hearing is required."). But we hesitate to affirm on that ground, both because the text of § 1446(c)(5) is unequivocal and because, at the time the district court ordered removal of the state prosecution, it did not yet have the benefit of any responsive pleading from Wyoming. Section 1442(a)(1) requires a substantial factual showing to justify removal, and comity demands that federal courts dot their i's and cross their t's before taking the serious step of removing a state criminal prosecution to federal court. *See Mesa*, 489 U.S. at 138 (stressing the "strong judicial policy against federal interference with state criminal proceedings") (internal quotation marks omitted). In order for removal under § 1442(a)(1) to be appropriate, a federal officer (or someone acting under him) must not only show that he is being prosecuted for the manner in which he carried out his federal duties, but must also demonstrate that there exists a colorable federal defense for the act. *See id.* at 139. There will be cases, like *Mesa* itself, when federal officers sued or prosecuted for official acts are not entitled to removal. Courts must be careful not to remove state criminal prosecutions to federal court on the basis of "ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers by charging them with traffic violations and other crimes for which they would have no federal defense in immunity or otherwise." *Id.* at 138. Removal under § 1442(a)(1) is not a mere formality.

In this case the district court ordered removal without giving Wyoming an opportunity to contest the factual basis for removal. This practice violated

the technical requirements of 28 U.S.C. § 1446(c)(5) and might conceivably have affected the nature of the inquiry required by § 1442(a)(1). The court had little before it other than Mr. Jimenez's motion for removal and the Affidavit of Probable Cause, on which the Wyoming prosecution was based. The Affidavit of Probable Cause stated that "a United States Fish and Wildlife employee along with another person had trespassed on private deeded land in the furtherance of capturing and/or releasing wolves." Jimenez App. 20. Although the State's apparent admission, in this Affidavit, that the trespass was "in the furtherance of the federal policy of wolf capture and release suggests the likelihood of a Supremacy Clause immunity defense, that admission may not be sufficient, without more, to establish a colorable federal defense. Consistent with the language of the Affidavit of Probable cause, it might have been possible, for example, that Mr. Jimenez's trespass represented a mere cutting of corners or carelessness, not reasonably necessary for the wolf capturing operation. We need not determine whether the district court's decision to forego an evidentiary hearing was legal error, however, because we find that any error was without a doubt harmless.

We now know that there were no material facts in dispute. It is undisputed that Defendants Jimenez and Livingston were federal officials,[7] and

---

[7] As noted above, although Mr. Livingston was a federal contractor rather than a federal official, the State waived any argument that he is not covered

likewise undisputed that they have a colorable federal defense. That is all that is required for removal under § 1442(a)(1). In its briefs before this Court, the State has identified no disputed factual question relevant to removal, and appears concerned only with the formalities. In our view, to reverse and remand to the district court for an evidentiary hearing (on nothing), as the State requests, would be a colossal waste of time and resources.[8]

The Defendants-Appellees have not expressly argued that the district court's error, if any, was harmless. We may nonetheless address harmless error *sua sponte* if three conditions are met: (1) the record is not overly long or complex; (2) the harmlessness is not debatable; (3) reversal would result in futile and costly proceedings in the district court. *See United States* v. *Samaniego,* 187 F.3d 1222, 1224-25 (10th Cir. 1999). This case satisfies all three requirements: the record is short, there is no serious doubt about the harmlessness, and a remand for an evidentiary hearing would be futile. Accordingly, we hold that the failure to conduct an

---

within the terms of either the removal statute or the doctrine of Supremacy Clause immunity.

[8] Wyoming does not argue that the evidentiary hearing requirement of § 1446(c)(5) is jurisdictional, and it is not. It is well settled that parties may stipulate to a waiver of the evidentiary hearing, which would not be permitted if holding the hearing were a jurisdictional requirement. *See Long,* 837 F.2d at 730.

evidentiary hearing, whether or not error, was harmless. We do urge district courts when facing a motion for removal under § 1442(a)(1) to ensure that the State has an adequate opportunity to identify any disputed issues of fact relevant to removal, and to conduct an evidentiary hearing to resolve them, before acting on the motion.

B. Supremacy Clause Immunity

1. Standard of Review

Having established that the district court properly removed the Wyoming prosecution to federal court, we must now consider whether the district court properly held that the Defendants are entitled to Supremacy Clause immunity. Supremacy Clause immunity dismissals present a mixed question of law and fact and are reviewed de novo. *Tanella,* 374 F.3d at 146. The appellate court must review the evidence in the light most favorable to the non-moving party and assume the truth of the allegations in the indictment. *Id.* at 148. However, once a defendant raises the defense of Supremacy Clause immunity the burden shifts to the state to supply sufficient evidence to raise a "*genuine* factual issue" that is supported by more than mere allegations. *See Long,* 837 F.2d at 752. The parties do not dispute these standards, which we believe are appropriate for a review of a motion to dismiss on Supremacy Clause immunity grounds.

When the district court grants Supremacy Clause immunity on a motion to dismiss, we review the district court's decision by asking two questions:

(1) Whether the federal officer had authority for his acts under the Constitution or the laws of the United States; and (2) whether there is a disputed issue of fact bearing on whether the federal officer had an objectively reasonable and well-founded basis to believe that the indicted acts were necessary to carry out his duties.[9]

2. *Federal Authorization*

The first question is whether the Defendants had federal authorization for their acts on February 14, 2004. Mr. Jimenez and Mr. Livingston were acting under regulations promulgated pursuant to the Endangered Species Act, which authorizes the designation of nonessential experimental populations of endangered and threatened species and permits the promulgation of rules governing the management of these populations. 16 U.S.C. § 1539(j). The gray wolf was listed as an endangered species in 1978 in the lower 48 states except Minnesota. Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607 (Mar. 9, 1978). In 1994, the Secretary of the Interior adopted a gray wolf recovery program

---

[9] We note that denying a motion to dismiss does not foreclose a grant of Supremacy Clause immunity at a later stage in the litigation. If a court denies a motion to dismiss because there are genuine issues of fact to resolve, the resolution of those facts could demonstrate that Supremacy Clause immunity is appropriate. *See, e.g., Johnson,* 254 U.S. at 56-57.

that provided for the annual reintroduction of fifteen wolves in Yellowstone National Park and central Idaho. *Wyo. Farm Bureau Fed'n* v. *Babbitt,* 199 F.3d 1224, 1228-29 (10th Cir. 2000). The Department of the Interior published final rules authorizing the USFWS to manage gray wolf populations in the Yellowstone Management Area. 50 C.F.R. § 17.84(i)(7)(ii).[10] The regulations designate all of Wyoming, as well as parts of Idaho and Montana, as the boundaries of the nonessential experimental population area for the Yellowstone Management Area. *Id.* The final regulations are intended to give the reintroduced gray wolves an opportunity to thrive while at the same time mitigate the concerns of ranchers about livestock predation. For example, ranchers may take nonlethal measures to harass wolves on their property, *id.* § 17.84(i)(3)(i), and may kill wolves that are actively attacking their livestock, *id.* § 17.84(i)(3)(ii).

The regulations do not merely authorize, but impose an obligation on the USFWS to monitor wolves. *Id.* §17.84(i)(8) ("The reintroduced wolves will be monitored during the life of the project . . . ."). This monitoring regulation is important because it provides direct federal authorization for the actions of the Defendants.

---

[10] Since the acts at issue in this prosecution, the Department of the Interior has updated the gray wolf regulations. *See* 70 Fed. Reg. 1286-01 (Jan. 6, 2005). We focus on the regulations in effect at the time of the relevant acts.

We note, however, that the regulation does not contain an explicit grant of authority for USFWS staff to trespass. The regulations that do address private land do not state whether USFWS officials need to secure permission from landowners before operating on their land. For example, in a section addressing problem wolves that have attacked livestock, USFWS staff have the authority to relocate "[a]ll wolves on private land" to "other areas within the experimental population area if continued depredation occurs." *Id.* § 17.84(i)(3)(vii). The lack of any reference to the permission of the land owner distinguishes these regulations from those governing the reintroduction of other species. For example, the Mexican gray wolf regulations state: "If any wolves move onto private land outside the designated recovery area(s), but within the Mexican Wolf Experimental Population Area, the Service or an authorized agency will develop management actions in cooperation with the landowner including capture and removal of the wolf or wolves if requested by the landowner." *Id.* § 17.84(k)(11). We are hesitant to read too much into the differences between this language and the gray wolf regulations, but there is a plausible inference that USFWS staff acting pursuant to the gray wolf regulations have a slightly freer hand when working on private land than those acting pursuant to the Mexican wolf regulations.

In any event, Supremacy Clause immunity does not require that federal law explicitly authorize a violation of state law. The Supreme Court found federal authorization in *Neagle* despite the fact that the Attorney General's order did not explicitly authorize the use of lethal force, and in *Thomas* even

though the federal oleomargarine provision did not authorize violation of Ohio's notice requirement. The question is not whether federal law expressly authorizes violation of state law, but whether the federal official's conduct was reasonably necessary for the performance of his duties. Accordingly, there is no question that the Defendants had federal authorization for the capture and collar operation that led to their indictments.

3. *Reasonable and Necessary*

Having determined that the Defendants had federal authorization for their conduct, we next ask whether Mr. Jimenez and Mr. Livingston had an objectively reasonable and well-founded basis to believe that their actions were necessary to carry out their duties. Because the State does not dispute that the federal agents subjectively believed their actions were necessary, we consider only whether that belief was well-founded and objectively reasonable. As mentioned earlier, we decline to consider whether subjective reasonableness is a necessary consideration in Supremacy Clause immunity cases.

It is undisputed that tracking the Washakie pack was a difficult enterprise. Extensive forest cover and frequent windy conditions in the home range of the wolves make it difficult for the USFWS to attend to the duty to monitor the wolves on their own turf. It is also uncontested that the spotting of the pack far outside of its normal range on February 13, 2004, presented unusually favorable conditions for the Defendants to capture and collar the wolves. Given the difficulty of tracking the wolves there is no

question that it was objectively reasonable for the Defendants to believe that taking advantage of this opportunity was necessary to carry out their duty to monitor the wolves.

The more difficult question is the reasonableness of their decision to immobilize the wolves and place them on land that might turn out to be private. The Defendants do not argue that federal law gives them a right to trespass with impunity when pursuing wolves, nor do they argue that when exigent circumstances exist there is a limited right to trespass. Thus, we need not consider those arguments. The record, including declarations from cattle ranchers hostile to the wolf program, shows that Mr. Jimenez is conscientious about securing permission from land owners when he knows he might be on their land. Rather, the Defendants argue that they made reasonable attempts to determine whether they were on private land in this case and that there were no indications, such as signage or fences, that they were on private land.[11] Thus, the Defendants contend, there were

---

[11] Under Wyoming law, unauthorized presence on private land constitutes criminal trespass only when the defendant enters or remains "knowing he is not authorized to do so, or after being notified to depart or to not trespass." Wyo. Stat. § 6-3-303(a). On the facts of this case, therefore, the Defendants would seem to have a plausible defense under state law. The question for purposes of Supremacy Clause immunity, however, is not whether the federal official is guilty under state law, but whether he has established immunity under federal law. *Neagle,*

objective reasons to believe that they were not on private land. *See Texas v. Carley,* 885 F. Supp. 940, 945-46 (W.D. Tex 1994) (granting a motion to dismiss on Supremacy Clause immunity grounds to a USFWS employee indicted for trespass, where the officer had no indication that the land was private). It is not clear to us that the Defendants would have lacked an objectively reasonable basis to believe their actions were necessary to the performance of their functions, even if they had been aware they were on private land. But their claim of immunity is based on that lack of awareness, and we therefore address the issues in those terms.

Wyoming counters that there were signs in the area and that the GPS coordinates from the helicopter indicated that each discharge of a dart or net was over private land. Wyoming argues that this evidence was sufficient to create a question of fact as to whether the Defendants' belief that they were on public land was objectively reasonable.

We believe the undisputed evidence in the record establishes that the Defendants' belief that they were on private land was objectively reasonable and well-founded. Given the expansive range of gray wolves as well as their propensity to run in any direction after being darted, it would be an onerous burden on federal officers like Mr. Jimenez to require them to determine the precise boundaries of land that *might* be encountered, on threat of

---

135 U.S. at 54. It is logically possible for an indicted federal official not to be immune, but to be not guilty.

criminal prosecution if they should be in error. *Cf. Davis,* 100 U.S. at 263 (warning that state interference with federal law may "paralyze the operations of the government"). The undisputed evidence shows that the area in which this wolf collaring operation took place is a jumble of federal, state, and private land. Mr. Jimenez consulted both the fixed-wing pilot and the helicopter pilot in advance of the operation and secured their opinion that the operation would take place on public land. It is likewise undisputed that the location where Mr. Jimenez processed the wolves was close to a county road, and that it took the specialized skills of state surveyors to determine that the operation extended beyond the county right-of-way for the road. There were neither fences nor signs between the road and the processing location, though there were some signs in the distance. Moreover, when Mr. Kruger, a part owner and employee of the Larsen Ranch, came by he chatted amicably with Mr. Jimenez and offered no indication that Mr. Jimenez and Mr. Livingston were trespassing on Ranch property.

Wyoming law treats the presence of a person on the private land of another as criminal trespass only when he enters or remains "knowing he is not authorized to do so, or after being notified to depart or to not trespass." Wyo. Stat. § 6-3-303(a). Notice may be provided in two ways: "(i) Personal communication to the person by the owner or occupant, or his agent, or by a peace officer; or (ii) Posting of signs reasonably likely to come to the attention of intruders." *Id.* A reasonable person operating on what might be private land in the State of Wyoming would presumably be on alert for these

two types of notice, and would interpret their absence as an indication he was not trespassing. In particular, the Defendants' encounter with Mr. Kruger would induce reasonable persons to believe either that they were not on Ranch property or that he acquiesced to their presence.

The State argues that there are some uncontested facts that suggest that the Defendants should have known they were on private land. For example, the parties do not contest that when one of the Defendants fired a dart or net from the helicopter, the pilot would press a button to lock in the GPS coordinates at the time. The parties also do not dispute that comparing these coordinates to a detailed map of the area shows that each time the pilot locked in coordinates the helicopter was over private land. Wyoming asserts that this information creates an issue of genuine fact as to whether the officers were objectively justified in their belief that they were operating on public land. We disagree. Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to federal officers at the time of the act in question, rather than the more subtle and detailed facts later presented to a court. *See Neagle*, 135 U.S. at 76. At the time the pilot locked in the coordinates, the Defendants were manning a net gun and dart gun on a helicopter that had no doors. These circumstances made consulting a map difficult, if not impossible. At most, the GPS coordinates could have enabled the Defendants, after the fact, to determine where they had been when they encountered the wolves, but this could not have provided information regarding land ownership during real time. Moreover, the GPS

coordinates are thin evidence of trespass because the helicopter did not land at these points and the wolves did not immediately go down after being hit. Even if objective reasonableness required on-the-fly cross-referencing of the GPS data with map data, which we do not believe it does, the GPS data would only demonstrate that the helicopter stage of the operations took place over, but not on, private land. Wyoming also argues that the district court ignored evidence submitted about the signage and structures in the area where Mr. Kruger encountered the Defendants. Wyoming contends that these indications could have alerted the Defendants that they were on private land, creating a disputed factual question. There are two flaws in this argument. First, it is uncontested that the structures were not in the immediate vicinity of the Defendants while they were tending to the wolves. Structures and fences in the distance suggest only that the area off in the distance is private land and say little about the area where the Defendants were dealing with the wolves. Indeed, the presence of far-off structures and fences may reenforce the impression that an unfenced, unsigned area adjoining a public road is not private. We find it significant that the County had to hire professional surveyors to determine whether the Defendants were on a public right of way or on deeded private land. Objective reasonableness does not require federal actors carrying out their duties to estimate property boundaries with a surveyor's precision, at the peril of criminal prosecution.

Second, even on the assumption that the Defendants saw or should have seen the signs

identified by Wyoming, these did not provide the Defendants reason to know they were trespassing, because the signs implicitly authorize entry. The signs contain admonitions such as: "Hunter Management Area Ends Here—Respect the Landowner and the Land," "Notice: No Off Road Vehicle Travel," "Walk-In Area. Foot Traffic Only [Except on Designated Trails]—Hunting on this land is provided for your enjoyment—Respect the Landowner And the Land," and more cryptically "No Traffic Allowed Off Lease Roads Without Permission of Landowner." Jimenez App. 174, 176, 178. It is reasonable to read these signs as permitting members of the public to enter the private land, and even hunt animals on that land, so long as they respect the land and do not drive vehicles off road. If the Defendants did see these signs they would have reason to believe the signs indicated private land, but they would also have reason to believe that their presence on private land was permitted. Thus, it does not matter whether the Defendants actually saw the signs. In either case they would have a well-founded basis to believe that they were not committing criminal trespass, and thus that their entry on the land was an objectively reasonable mode of carrying out their federal duties.

Our review of the evidence presented to the district court demonstrates that while the Defendants were attempting to fulfill their federal duty to monitor the wolves through a capture and collar operation they confined their acts to an objectively reasonable view of the scope of their authority. Thus, the district court correctly granted

immunity to the Defendants and correctly dismissed the indictment.[12]

IV. Conclusion

Granting immunity in this case serves the purposes for which Supremacy Clause immunity was developed. The record evidence supports the suspicion that the prosecution of Mr. Jimenez and Mr. Livingston was not a bona fide effort to punish a violation of Wyoming trespass law, which requires knowledge on the part of a trespasser, *see* Wyo. Stat. § 6-3-303(a), but rather an attempt to hinder a locally unpopular federal program. An early grant of immunity reduces the risk that the possibility of state criminal prosecution will deter the performance by federal officers of their federal duties. For the reasons stated above, we **AFFIRM** the order of the district court denying Wyoming's motion to vacate removal and granting the Defendants' motion to dismiss.

---

[12] The only material distinction between the conduct of Mr. Jimenez and the conduct of Mr. Livingston was Mr. Jimenez's hike of roughly a quarter mile to retrieve a darted wolf. Wyoming has not argued that this foray differed in any material way from the rest of the Defendants' activities that day.

IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF WYOMING

[FILED JULY 16, 2004]

STATE OF WYOMING,	)
	)
Plaintiff,	)
	)
v.	)No. 04-CR-98-J-20
	)
MICHAEL DAVID JIMENEZ,	)
	)
Defendant.	)

STATE OF WYOMING,	)
	)
Plaintiff,	)
	)
v.	*)No. 04-CR-103-J-17*
	)
WESLEY O. LIVINGSTON,	)
	)
Defendant.	)

ORDER DENYING MOTIONS TO VACATE ORDER
OF REMOVAL OF CRIMINAL PROSECUTION
AND
ORDER GRANTING MOTIONS TO DISMISS

The plaintiff's "Motion[s] to Vacate Order[s] of Removal of Criminal Prosecution" and defendants' motions to dismiss, and the parties responses in

opposition one to the other, came before the Court for hearing June 30, 2004. Appearing for plaintiff was Bryan Skoric, Park County Prosecuting Attorney, and for defendant Jimenez was Michael Johnson, Assistant United States Attorney, Denver, Colorado, and for defendant Livingston, Michael S. Messenger of Thermopolis, Wyoming. The Court, having considered the parties' written submissions, the arguments of counsel, the pleadings of record, the applicable law, and being fully advised, FINDS that the plaintiff's Motions to Vacate Order of Removal should be DENIED and that the defendants' Motion to Dismiss should be GRANTED, for the reasons stated more fully below and stated orally from the bench at the conclusion of the June 30, 2004 hearing.

Background

Defendant Jimenez is a biologist with United States Fish and Wildlife Service and is project leader for the wolf recovery program in Wyoming. His duties include capture of wolves by leg-hold trapping and helicopter darting and netgunning, for the purpose of radio-collaring, examining and release of wolves for monitoring thereafter. He is also responsible for authorizing control of wolves which prey on livestock. He has authorized the kill of 28 wolves in control actions.

Defendant Livingston was employed by Hawkins and Powers, Inc., as a wolf handler/mugger while Hawkins and Powers Aviation, Inc., was fulfilling its contractual obligation with the United States Fish and Wildlife Service to capture and radio

collar wolves. Livingston was working under the direct supervision and direction of Jimenez, on February 14, 2004, the day of the at-issue wolf capture operation.

The state's criminal prosecution of Jimenez, as project leader, arises as a consequence of efforts to capture, process and radio-collar wolves. On February 13, 2004, Jimenez organized a capture operation for the Washakie pack, which had a history of livestock depredation and had been difficult to locate and radio-collar for monitoring. That day Jimenez phoned his supervisor, Edward Bangs, and informed him the pack had been located by fixed wing aircraft far outside of their normal home range, that the pack was in an area vulnerable to helicopter capture, that he had put together a capture operation to capture and process the pack on February 14, 2004, and that he had checked local maps and it appeared the pack was on public land. Bangs supported the capture operation. Because Jimenez had checked maps and perceived the pack to be well within public lands, he did not request permission from local land owners to enter their lands for the wolf capture operations. Jimenez's usual practice was secure consent from private landowners when he believed he would be present on private property during the course of such wolf recovery operations.

On February 14, 2004, the pack was located. Livingston joined the helicopter crew as a net gunner, sitting on one side of the helicopter and Jimenez was on the other side manning the tranquilizer dart gun. Once the pack was spotted,

the doors were removed to permit full range of motion for the net gun and the dart gun. At that point, reading maps in the open cockpit of the helicopter became impossible. Five wolves were captured. One was collared and released on site; of the other four, one was immobilized close to County Road 4CP near Meeteetse. By the time this wolf was collected with the other three immobilized wolves, the helicopter was low: on fuel. The four wolves were brought to County Road 4CP and the helicopter left to re-fuel. Jimenez decided to process the four unconscious wolves while the helicopter was refueling. It was sunny that day. Because tranquilized wolves keep their eyes open and have a difficult time regulating body temperatures, Jimenez and Livingston moved the wolves from the road down a steep embankment to some bushes, so they could be processed in the shade of the bushes, standard procedure in such instances.

Jimenez did not know the property on either side of the road was anything but public land. There were no immediate fences; no signs or notices were posted that indicating private property in the area where Jimenez and Livingston were processing the wolves. While Jimenez was processing the wolves, Randy Krueger, an owner of the Larsen Ranch in Meeteetse, drove up and asked what he and Livingston were doing. Jimenez explained; Krueger took several photographs of the wolves. Jimenez asked if he wanted to have his picture taken with the wolves, but Krueger declined and left. Krueger never told Jimenez they were on private land or indicated that they were not permitted at the bottom of the road embankment; he never asked Jimenez to

get off Larsen Ranch property or get the wolves off ranch property. The pack returned to their normal range far from Meeteetse after the effects of the tranquilizer wore off. More than a week after the February 14, 2004 Washakie pack capture operation, Jimenez learned Krueger believed the operation had taken place on his land.

On April 16, 2004, a separate Misdemeanor Information was filed against each of Jimenez and Livingston in the Park County Circuit Court, Fifth Judicial District for the State of Wyoming, Criminal Docket No. CR-2004-32COD. Livingston appeared before the Circuit Court May 11, 2004; Jimenez has never appeared before the Circuit Court. May 4, 2004, defendant Jimenez filed his "Notice of Removal of Criminal Prosecution Pursuant to 28 U.S.C. §§ 1442(a)(l) AND 1446(a);" an "Order of Removal of Criminal Prosecution Pursuant to 28 U.S.C. §§ 1442(a)(i) was entered May 7, 2004. On May 10, 2004, Livingston filed a Notice of Removal with this United States District Court; the Court entered an Order of Removal on that date.

Plaintiff's Motion to Vacate Order of Removal of Criminal Prosecution

The state argues that this court is without statutory authority to remove these cases to federal court because the defendants were not arraigned before removal. It also urges that no removal can take place prior to an evidentiary hearing and no such hearing has occurred (although it is not entirely clear from the state's submissions whether such an evidentiary hearing should take place in state or

federal court). Accordingly, the state argues that the proper remedy is to vacate the orders of removal and permit these matters to proceed to conclusion in state court.

Both defendant have opposed the motion seeking to vacate the orders of removal. As to defendant Livingston, the court notes that the state's first argument is without merit because Livingston was arraigned in state court. As to both defendants, they contend that removal was proper under 28 U.S.C. 1446(c)()l) and that no evidentiary hearing is required in the circumstances of this case.

Defendants' Motion to Dismiss

Jimenez contends he is immune pursuant to applicable federal law from prosecution under Wyoming state law for acts reasonably undertaken in the discharge of his federal duties. He cannot be prosecuted for a crime under Wyoming state law for acts he performed as a federal officer pursuant to, and in furtherance, of federal law. He cites the two part test adopted by the Tenth Circuit to determine whether federal immunity should obtain: (1) whether the federal agent was performing an act which he was authorized to do by federal law; and (2) in performing such an authorized act, whether the federal agent did no more than what was necessary and proper. State of New Mexico v. Dwyer, 105 F.3d 670 (Unpublished Disposition), Text at 1997 WL 8874, *3 (10th Cir. 1997) (attached to the defendant's brief). Jimenez argues, and this Court agrees, that he has satisfied both parts of this test.

The misdemeanor information does not dispute that Jimenez was performing an act which he was authorized to perform by federal law when it states he is a "United States Fish and Wildlife Employee" and that he had taken certain actions on February 14, 2004 in "furtherance of capturing and/or releasing wolves." The Wolf Reintroduction Program is authorized by the Endangered Species Act, and by way of 16 U.S.C. § 1539(j), Congress has authorized the release and related transportation of any population of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species. The Secretary has determined release will further conservation of the gray wolf and has promulgated regulations to reintroduce wolves into certain areas, including Wyoming. 50 C.F.R. § 17.84(1).

In performing these acts, Jimenez contends he was doing no more than what was necessary and proper. This includes an inquiry into two components of the second part of the test: (1) whether the agent subjectively believed that his actions were authorized; and (2) whether this belief was objectively reasonable. State of New Mexico v. Dwyer, id., *3. The agent's honest belief need only be reasonable for immunity to obtain; it need not be correct. Id. Jimenez asserts he subjectively believed his actions were authorized. His belief was objectively reasonable, based on his review of relevant maps prior to the start of the operation, statements made to him by the local helicopter pilot and the fixed-wing pilot, the lack of fences, signs or other postings informing him to the contrary, the

inability to check maps from the inside of the helicopter as it chased wolves with its doors open, and Krueger's failure to inform him he was illegally present on private land when Jimenez encountered him at the bottom of the road embankment.

Jimenez cites numerous cases in which immunity has been determined, including State of Texas v. Carley, 885 F. Supp. 940 (W.D. Tex. 1994), a case in which a Fish and Wildlife Service employee conducting a National Wetlands Inventory accidentally trespassed on private lands belonging to two ranches. In that case, the Fish and Wildlife Service employee actually had been informed he was on private land and he left. That court determined although Carley was mistakenly on private property, he had not diverted from his duties and was entitled to immunity. Here, Krueger never even informed Jimenez that he was on private property.

Jimenez contends neither the facts nor the law support a criminal trespass charge under Wyoming law. Under Wyoming criminal trespass statute, a person is guilty of criminal trespass if he "enters or remains on or in the land or premises of another person, knowing he is not authorized to do so, or after being notified to depart or to not trespass." The statute also provides how notice is given, by (i) "personal communication to the person by the owner or occupant, or his agent, or by a peace officer, or (ii) Posting of signs reasonably likely to come to the attention of intruders." None of this occurred; none of this is refuted by the state. The misdemeanor information does not allege notice was provided by any means; it does not demonstrate the

elements of the statute have been satisfied. Further the affidavit in support of probable cause does not contain essential facts constituting the offense charged.

The state of Wyoming had to conduct an investigation, obtain maps, and have the Park County engineer conduct a survey to determine whether Jimenez had trespassed on February 14, 2004. Such effort is necessary for local residents to determine if a trespass had occurred, yet it is assumed that Jimenez formed the requisite intent to criminally trespass while operating over an area that is a checkerboard of federal state and private land, while chasing wolves from a pursuing helicopter with open doors. These omissions are fatally defective to the misdemeanor information, in the view of Jimenez.

Likewise, Jimenez argues that neither the facts nor the law support a criminal littering charge. The applicable statute provides in pertinent part that "[a][person is guilty of littering if he places, throws, scatters or deposits garbage, debris, refuse or waste material, objects or substances, including abandoned or junked vehicles, upon the property of another." Wyo. Stat. § 6-3-204(a). The information does not specify what "objects" were placed on private property; the factual circumstances of the littering charge are not expressed. The defendants seek dismissal of the charges against them.

Both Jimenez and Livingston contend that they are shielded from prosecution under Wyoming state law by the doctrine of sovereign immunity.

Defendant Jimenez argues that he was performing acts as a federal officer pursuant to and in furtherance of federal law. He argues that he satisfies the two part test enunciated by the Tenth Circuit in State of New Mexico v. Dwver, 105 F.3d 670, 1997 WL 8874, *3 (10th Cir. 1997), to be used in determining whether federal immunity should obtain: (1) Whether the federal agent was performing an act which he was authorized to do by federal law; and (2) in performing such an authorized act, whether the federal agent did no more than what was necessary and proper.

Defendant Livingston also urges this court to find that he is entitled to federal immunity under the protection afforded by contractor governmental immunity. He relies on numerous cases, primarily civil in nature, in which employees of a government contractor were afforded federal governmental immunity.

The state argues that neither defendant is immune from prosecution in this case. The state contends that immunity is only a possibility when the case is "properly before this court, which can only occur after an evidentiary hearing, which has never occurred." As to defendant Jimenez, the state argues that his claims of federal immunity fail because the facts indicated that defendant was on private property at the time of the alleged trespass, and therefore, his acts cannot be considered objectively reasonable under the second prong of the two part test in In re Neagle, 135 U.S. (1890) and Dwyer, 105 F.3d 670, 1997 WL 8876, *3 (10th Cir. 1997). The state also argues, specifically as to

defendant Livingston, that the civil cases upon which he has relied do not apply in this criminal action and that he is not entitled to avail himself of the government contractor immunity doctrine.

Discussion

1. Motion to Vacate Order of Removal

Title 28, United States Code, § 1442(a) provides:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any. officer of the United States or any agency thereof, or any person acting under him, for any act under color of such officer or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> (2) a property holder whose title is derived from any such officer,where such action or prosecution affects the validity of any law of the United States.

> (3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;
>
> (4) Any officer of either House of Congress, for any act in the discharge of his official duty under an Order of such House.

As the Court noted in its oral rulings from the bench at the hearing, the state has submitted nothing to contest the official status of the federal officer, defendant Jimenez, or the agent who was employed by Hawkins and Powers, a government contractor, to assist in the helicopter capture of the wolves, defendant Livingston. Further, the state has not contested in any way that the purpose of the defendants' acts, and particularly those of Jimenez, was to act pursuant to the Endangered Species Act. The state has not contested that Livingston was working on that day under the supervision and direction of Jimenez.

Both Jimenez and Livingston were charged with violation of criminal statutes in the State of Wyoming in the Circuit Court, Fifth Judicial District, Park County, Wyoming, Criminal Docket No. CR-2004-32 COD. They were charged with trespass upon private land in furtherance of capturing and/or releasing wolves and with littering in violation of state statute. The state has taken the position that the tranquilized wolves, reflected in the photograph in state's Exhibit D, are indeed the litter at issue in this case, which is a preposterous

position. It defies common sense to argue that living, tranquilized wolves, or other wildlife, are "garbage, debris, refuse or waste material, objects or substances" are litter, within the meaning contemplated by application of controlling Wyoming law. The legislature could not reasonably have intended such a definition to be employed in cases such as these.

The criminal action against Jimenez was commenced by filing a misdemeanor information April 16, 2004; Livingston was similarly charged on that date. On May 4, 2004, a notice of removal in the state action against Jimenez was filed by him in the United States District Court for the District of Wyoming. Livingston filed his notice of removal on May 10, 2004. Removal was sought under Title 28, United States Code, Section 1442, providing for removal of cases, civil and criminal, brought against federal officers or any person acting under that officer, under prosecution in state court for acts performed under color of office or on account or any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. 28 U.S. C. § 1442(a)(1).

Procedural rules for removal are found at 28 U.S.C. § 1446. The state has argued, without citation to persuasive authority, that federal law requires a defendant to be arraigned in state court prior to filing a notice of removal. It urges that 28 U.S.C. § 1446(c)(5) includes, presumably implicitly, a requirement for arraignment prior to removal. This argument is of no moment with respect to defendant

Livingston's notice of removal; he was in fact arraigned in state court. However, the Court finds that the statutory scheme for removal outlined in Title 28 does not require arraignment of a federal officer being prosecuted under state law before a right to remove to federal court obtains. No requirement for arraignment prior to removal exists in this statutory scheme and the Court will not find one where no such requirement exists.

The Court holds that 28 U.S.C. § 1446(c)(l) provides a notice of removal of a criminal prosecution shall be filed not later than. 30 days after the arraignment in state court or at any time before trial, whichever is earlier, except that for good cause shown the district court may enter an order granting a defendant leave to file the notice at a later time. The pertinent statute provides only for a time period within which a notice of removal may be filed. The limitation claimed by the state does not exist.

Other statutes support this interpretation. Section 1447 provides generally that the federal court may issue all necessary orders and process to bring before it all proper parties, such as service of process and compelling parties to come before the Court for arraignment. Section 1448 authorizes the federal court to take action to ensure the parties who have not been properly served are brought before the Court so that the federal court may act. Section 1446(c)(l) sets an upper limitation for the time in which a notice of removal may be filed and does not require removal to follow arraignment in the state forum. The Court holds that removal in both cases

was timely and in accordance with 28 U.S.C. § 1446(c)(l).

The state has also argued that a full evidentiary hearing must occur before removal will be permitted. The Court notes that the state relies on Section 1446(c)(4) to support this contention. Section 1446 provides:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not

required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good

cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

28 U.S.C. § 1446.

The express language of Section 1446 requires summary remand if it appears clearly on the face of the notice and annexed exhibits that removal should not be permitted. An evidentiary hearing is to be held promptly if summary remand is not ordered, to determine whether removal shall be permitted. The scope of the evidentiary hearing permitted under Section 1446 is limited; it is not an evidentiary hearing directed toward trial on the merits or a hearing of underlying claims and disputes, as the state has seemed to suggest in its arguments. In this case, there is no meaningful dispute that the defendants have been sued in state court for actions taken under color of the federal office and that they have raised colorable federal defenses. Where there is no disagreement as to the facts relevant to the Court's determination of the removal issue, no evidentiary hearing is required by Section 1446(c)(5). See New York v. Tanella, 239 F.Supp.2d 291, 295 (E.D.N.Y. 2003); Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97-98 (1921).

Here, it is entirely undisputed that Jimenez was engaged in wolf capture and release, pursuant to his duties pursuant to the Endangered Species Act, at the time he committed the alleged criminal acts (trespass and littering of wolves) that are at issue in this case. He was an employee of the United States Fish and Wildlife Service. Defendant Livingston was acting under the direction of defendant Jimenez, was an employee of Hawkins and Powers, the government contractor employed by the government to assist in the capture of the

wolves. Both defendants have raised colorable federal defenses, specifically that they are immune from prosecution under the Supremacy Clause of the Constitution for acts that they reasonably believed were necessary and proper in the performance of their duties.

The Court is not persuaded by the State's argument that the requirements for removal have not been satisfied. Section 1442(a)(1) requires no more than the assertion of a colorable defense. At the stage of the proceedings where the Court must determine whether removal is appropriate, it is "important to remember . . . the federal officer need not prove or prevail on his defense; he needs merely to raise it." New York v. Tanella, 239 F.Supp.2d at 296.

> The Supreme Court has held that § 1442(a)(1) reflects a congressional determination that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." . . . Thus, removal must be allowed "to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties."

New York v. Tanella, at 296 (citations omitted). See also Mesa v. California, 489 U.S. 121, 109 S.Ct. 959 (1989); Fink v. Todd Shipyards, 2004 WL 856734

(E.D. La. 2004); Hoste v. Shanty Creek Management, Inc., 246 F.Supp.2d 776, 781 (W.D.Mich. 2002).

The Court finds that the plaintiff's motions seeking to vacate this Court's Orders of Removal of Criminal Prosecution should be DENIED and that removal to this federal court is proper in the above captioned cases.

2. Defendants Motions to Dismiss

Both defendants have urged this Court to grant their motions to dismiss, arguing that they are immune from state prosecution in this case. Defendant Jimenez contends that he is entitled to immunity, in that he was performing his duties as the project leader for the wolf recovery program in Wyoming for the United States Fish and Wildlife Service. Based on the supremacy of federal law, Jimenez asserts he is immune from prosecution for criminal trespass and wolf littering. Defendant Livingston argues that he also is immune from prosecution for criminal trespass and wolf littering based on the government contractor defense, derived from the supremacy of federal law. Not surprisingly, the State disagrees that either defendant is entitled to federal immunity from prosecution and has opposed the motions to dismiss. This Court agrees with both defendants and finds that they are immune from prosecution in this case. Each defendant will be considered in turn.

As to defendant Jimenez, the Court reiterates that he was performing his duties as a biologist with

the United States Fish and Wildlife Service and project director of the wolf recovery project in Wyoming. The Wyoming Wolf Reintroduction Program is authorized under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 and under an amendment to the Act, codified at 16 U.S.C. § 1539J), which authorizes "the release (and the related transportation) of any population ... of an endangered species or a threatened specie outside the current range of such species if the Secretary determines that such release will further the conservation of such species." The Secretary has made such determination and regulations have been promulgated to facilitate this goal. 50 C.F.R. § 17.84(i).

The United States Fish and Wildlife Service is charged with monitoring the reintroduction of wolf populations in Wyoming. The submissions of the parties in this case demonstrate clearly that the program is controversial and not entirely accepted in communities and areas most likely to confront directly the concerns, dislikes, and problems with wolves of a vocal portion of the local public. Because the program is controversial and in an effort to reassure Wyoming ranchers that wolf reintroduction does not unduly affect their operations, the Department of Interior has committed to collaring and monitoring reintroduced wolves. Federal regulations implementing the Endangered Species Act were published which require such monitoring. 50 C.F.R. § 17.84(i).

On February 14, 2004 Jimenez was performing an act he was authorized to perform

under United States law and that he was acting pursuant to his duties and responsibilities as a United States Fish and Wildlife biologist and project leader for the program in Wyoming.

The Tenth Circuit has discussed the doctrine of immunity. In State of New Mexico v. Dwyer, 105 F.3d 670 (Table), Unpublished Opinion, Text at 1997 WL 8874 (10th Cir. 1997), a case considering an appeal of the district court's granting of a motion to dismiss on the grounds of federal immunity, the circuit court stated:

> The doctrine of federal immunity is well-established. *See* In re Neagle, 135 U.S. 1, 75 (1890) (a federal agent held "to answer for an act which he was authorized to do by the law of the United States . . . [who] did no more than what was necessary and proper for him to do . . . *cannot* be guilty of a crime under the law of the State. . . . ") (emphasis in original). Courts have interpreted Neagle to require a two-part test: (1) whether the federal agent was performing an act which he was authorized to do by federal law; and (2) in performing such an authorized act, whether the federal agent did no more than what was necessary and proper. *See e.g.*, Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988).
>
> Here, the district court correctly applied this two-part test. It noted that

only the second prong was at issue, because "it is undisputed that [Dwyer and Matthews], at the time of the incident, were federal agents performing an act which they were authorized to do -- the inspection of the mill." . . .

The court then conducted the "necessary and proper" inquiry. This inquiry has two components: (1) Whether the agent subjectively believed that his actions were authorized; and (2) whether this belief was objectively reasonable. . . . The agent's honest belief need only be *reasonable* for immunity to obtain; it need not be *correct*. . . .

The first Long inquiry is factual. The magistrate judge found that Dwyer and Matthews "honestly and reasonably believed that their action was justified in carrying out their official duty to reassess reclamation bond requirements at the mill site." . . . This finding is not clearly erroneous.

The second Long inquiry is legal, and we therefore review it *de novo*. We agree with the district court and the magistrate judge that it was objectively reasonable for U.S. Forest Service agents to believe that they had authority to inspect, without prior notification but during normal business

> hours, a site located in a National Forest, owned by the United States, administered by the U.S. Forest Service, and operated privately pursuant to an operating plan guaranteeing access to federal agents. This is so even where the site operator normally received notification prior to inspections. We reach this judgment for the same reasons stated in the Magistrate's Order. . . .

State of New Mexico v. Dwyer, 1997 WL 8874, **3 (most citations omitted). The evidence before the Court satisfies the Dwyer requirements. Jimenez was authorized under federal law to perform the acts undertaken in connection with the wolf collaring program. He subjectively believed his actions were so authorized. It was objectively reasonable for him to believe that United States Fish and Wildlife agents in his circumstances had authority to perform all activities necessary to bring the wolf collaring operation to conclusion on that day.

As to defendant Livingston, he is entitled to avail himself of the immunity defense afforded federal government contractors. Although few cases have considered application of the doctrine in cases other than those involving contracts and other civil disputes, there is no persuasive reason that the analysis of those cases should not be applied in this case. Livingston was employed by Hawkins and Powers Aviation, Inc., a federal government contractor operating under a contract with the federal government in furtherance of the

congressional mandate to monitor the wolf recovery program. A person entitled to remove as a federal officer may raise the defense of federal immunity from suit. If Livingston had been an actual federal official, unquestionably, he, just like Jimenez, would be entitled to the protection of the official immunity doctrine. Policy considerations compel this Court to conclude that Livingston, an employee of a federal government contractor performing duties arising out of the Hawkins and Powers Aviation, Inc. contract with the federal government to assist with wolf monitoring, is entitled to official immunity in this case.

> The policy considerations underlying the extension of official immunity to a federal official's duty to investigate -and report suspected fraud apply with equal force to a fiscal intermediary or carrier. "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy" or by private contractors. . . . "Even though private persons under contract with the government act only partly in the public sphere, the public interest may demand that immunity protect them to the same

> extent that it protects government employees." . . .

Pani v. Empire Blue Cross and Blue Shield, 152 F.3d 67, 73 (2d Cir. 1998) (citations omitted). See also Adorno v. Correctional Services Corp., 312 F.Supp.2d 505, 521 (S.D.N.Y. 2004) (finding that government contractor immunity should obtain when contractor is performing that very thing that the government directed the contractor to do; applies only if government exercised significant control over the relevant actions of the contractor.).

The Court finds that defendant Livingston is entitled to assert the federal immunity defense available to government contractors, as set forth above.

The Court discussed at length during the hearing in this matter the facts relevant to this case as well as the law and will not reiterate what was said during the hearing again. The Court has considered the state's contentions that the defendants' conduct was not necessary and proper in the performance of their duties and that it fails to satisfy the objective prong of the test outlined in Dwyer, set forth above. This Court disagrees. The affidavit and the declaration of Special Agent Hermann are not persuasive. The fact that GPS coordinates were noted on private lands discloses little that is helpful as to the actual relevance or meaning of such information. This information does little more than indicate a particular point where darts and/or capture nets were fired from the helicopter; it does not indicate whether animals were

recovered or retrieved at those locations; it does not indicate what activities either Jimenez or Livingston engaged in at those particular locations, if any. The state has contended that each of these events occurred on private fee land of the Larsen Ranch Company. It is significant to this Court, however, that no one, especially the complaining landowner Krueger, bothered to advise either Jimenez or Livingston that they were on private property; Krueger stood mute and later complained to the prosecutor, as well as newspapers. Other information that the state relies upon to support its arguments is equally equivocal: Signs advising of no off-road traffic and of the end of hunter management areas on Larson ranch property some distance from the site of the tranquilized wolves and the defendants; a house in the distance in the photographs; the location of fences within 150 yards from the defendants' location next to the tranquilized wolves; the fact that the state required the expertise of the Park County Engineer to survey and determine whether the property on which Jimenez had placed the tranquilized wolves was public or private. None of these facts indicate that the objectively reasonable belief component of the Tenth Circuit and Neagle test has not been satisfied. The Court finds, as it expressly stated orally at the hearing, that the objective component of the test has been satisfied and rejects the State's arguments.

After considering all of the affidavits and the photographs submitted for consideration in this matter, particularly including those of Exhibit D, which depicts tranquilized wolves on the ground in a shady area, as well as the parties' written

submissions and arguments of counsel, the Court concludes that the two part test adopted in the Tenth Circuit and in the Neagle case has been met here. The federal agent, Jimenez, was performing acts authorized to perform by federal law. The agent was doing no more than necessary and proper; he subjectively believed that his actions were authorized by federal law, and from all surrounding facts and circumstances offered by the parties, the Court concludes that this belief was also objectively reasonable. Defendant Livingston, as a federal contractor, was acting under the instruction and supervision of the federal officer, Jimenez, the team leader in the wolf recovery program. As in State of Texas v. Carlev, 885 F.Supp. 940 (W.D.Tex. 1994), even if Jimenez and Livingston had mistakenly placed the tranquilized wolves on private property, they had not diverted from their federal official duties at any time and are entitled to immunity. For the reasons stated fully by the Court during the hearing of this matter, the Court finds that defendant Jimenez is immune from prosecution in this suit, and that defendant Livingston is likewise immune from prosecution.

Accordingly, the defendants' motions to dismiss should be GRANTED for the reason that they are immune from suit. This type of case is not a particularly well-suited vehicle for challenging the federal government's wolf recovery program as a whole. Because the foregoing is dispositive, the Court will not visit any arguments the parties have raised that have not been specifically addressed in this Order. To the extent that there are outstanding motions that are not addressed specifically in this

Order, such motions shall be DENIED AS MOOT. It is therefore

ORDERED that plaintiff's Motion to Vacate Order of Removal shall be, and is, **DENIED. It is further**

ORDERED that defendant Michael David Jimenez's Motion to Dismiss Pursuant to Fed. R. Crim. Pro. 12(b) shall be, and is, **GRANTED. It is further**

ORDERED that defendant Wesley 0. Livingston's Motion to Dismiss shall be, and is, **GRANTED. It is further**

ORDERED that all other outstanding motions shall be, and are, **DENIED AS MOOT. It is further**

ORDERED that the above captioned actions against defendant Jimenez and defendant Livingston shall be, and are, **DISMISSED WITH PREJUDICE.**

Dated this /16th/ day of /July/ 2004.

/s/ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	*No. 04-CR-103-J-17*
	)	
WESLEY O. LIVINGSTON,	)	
	)	
Defendant.	)	

[FILED May 10, 2004]

ORDER ON REMOVAL

On the /10th/ day of May, 2004, a Notice of Removal of Criminal Prosecution of the above-entitled action was filed with the Clerk of the United States District Court, District of Wyoming. It is, therefore,

ORDERED that pursuant to Rule 81.1 of the local rules of this Court, the removing party shall immediately file with the Clerk of the District Court, a copy of the notice of removal. The Clerk of the Circuit Court is hereby advised that jurisdiction over the parties and subject matter of the above-entitled action is deemed removed from the circuit court to the United States District Court for the District of Wyoming upon the filing of the Notice of Removal with the Clerk of the Circuit Court. It is

FURTHER ORDERED that in the event a hearing is pending in Circuit Court when the Notice of Removal is filed with the Clerk of the Circuit Court, the removing party shall immediately notify the Circuit Court Judge of the removal of this action. It is

FINALLY ORDERED that the removing party shall file with the Clerk of this Court copies of all records and proceedings in the Circuit Court within ten (10) days after receipt of this Order.

DATED this /10th/ day of May, 2004.

BY THE COURT

/s/ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

SEND COPY TO:

Michael S. Messenger
Messenger & Jurovich, P.C.
P. O. Box 111
Thermopolis, WY 82443

Bryan A. Skoric
Park County & Prosecuting Atty
Park County Courthouse
1002 Sheridan Avenue
Cody, WY 82414

Clerk of the Circuit Court (Cody)
Fifth Judicial District
Park County Courthouse
1002 Sheridan Avenue, Rm 206
Cody, WY 82414

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING,
Plaintiff,
vs. Case No. 04-CR-98J

MICHAEL DAVID JIMENEZ,
Defendant.

ORDER OF REMOVAL OF CRIMINAL PROSECUTION PURSUANT TO 28 U.S.C. § 1442(a)(l)

Defendant Michael David Jimenez's Notice of Removal, filed pursuant to 28 U.S.C. §§ 1442(a)(l) and 1446(a), is now before this Court. Having read the Notice of Removal and the exhibits attached to the Notice of Removal, and the Court being fully advised on the premises, it is hereby ORDERED as follows:

1. The criminal trespass action and criminal littering action now pending in the Circuit Court, Fifth Judicial District, Park County, Wyoming (Cody), docketed in the state Circuit Court as Criminal Docket No. CR-2004-32 COD, is hereby removed to this Court.

2. Pursuant to 28 U.S.C. § 1446(c)(5), the Circuit Court, Fifth Judicial District, Park County, Wyoming (Cody), shall proceed no further in Criminal Docket No. CR-2004-32 COD against Michael David Jimenez..

IT IS SO ORDERED this /7th/ day of May, 2004.

/s/ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c) (1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held

promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

BRYAN A. SKORIC
Park County and Prosecuting Attorney
1002 Sheridan Avenue
Cody, Wyoming 82414
Tel: (307) 527-8660
Fax: (307) 527-8668

Attorney for Plaintiff
State of Wyoming

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

STATE OF WYOMING

Plaintiff,

v.

MICHAEL DAVID JIMENEZ CASE NO. 04-CR-98J

Defendant.

STATE OF WYOMING'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

{Entered June 23, 2004}

COMES NOW the State of Wyoming, by and through Bryan A. Skoric, Park County and

Prosecuting Attorney, and hereby responds to the Defendant's Motion to Dismiss.

Defendant Jimenez moves this Court to dismiss the State's case based on two separate theories, both of which are groundless and indefensible. First, Defendant Jimenez argues that "[b]ased on the supremacy of federal law, Mr. Jimenez is immune from prosecution for criminal trespass and littering." This assertion, if true, would allow the Defendant, as well as any federal employee in the State of Wyoming to commit whatever crime they choose, so long as the crime was undertaken in the discharge of their federal duties. This assertion is simply not supported by the United States Constitution, nor any case law. (Note: Immunity is only a possibility once the case is properly before this Court, which can only occur after an evidentiary hearing, which has never occurred. In other words the question of immunity is not ripe before this Court. See supra, *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959 (1988)).

Defendant Jimenez also argues that the State's Misdemeanor Information is fatally defective because it fails to assert the necessary facts to support the charges. Again, the Defendant's argument is simply without merit or proper authority and should likewise be disregarded by this Court.

Defendant Jimenez is Absolutely Not Immune From Prosecution

The Defendant first argues that he "is entitled to immunity under the Supremacy Clause of the United States Constitution (Art. VI, C1. 2) for acts reasonably undertaken in the discharge of his federal duties. Consequently, he cannot be prosecuted for a crime under Wyoming State law for acts he performed as a federal officer, pursuant to, and in furtherance of, federal law." (See page 14 of Defendant's Motion).

The absolute failure of Defendant's argument is he cites no authority or law giving him some federal right to physically trespass and litter objects (wolves) on and upon the private property of residents of the State of Wyoming. Certainly, the United States Constitution does not provide him this authority, nor does any federal or state statute.

Defendant relies on *In Re Neagle,*135 U.S. 1, 75 (1890), and *State of New Mexico v. Dwyer*, 105 F.3d 670, 1997 WL 8874, *3 (10th Cir. Jan. 19, 1997), for the proposition that he has by some higher authority, been blessed with immunity. The Defendant is misguided in his reliance on these cases, specifically *Dwyer*, an unpublished decision for good reason. (As this Court is aware, the order and judgment of *Dwyer* is not binding precedent and the 10th Circuit generally disfavors its citation usage). In as much, the State does not dispute the standard employed by the 10th Circuit to determine if a federal employee is subject to immunity. This being, (1) whether the federal agent was performing

an act which he was authorized to do by federal law; and (2) in performing such an authorized act, whether the federal agent did no more that what was necessary and proper. The "necessary and proper" inquiry has two additional components. (1) whether the agent subjectively believed that his actions were authorized; and (2) whether this belief was objectively reasonable. (Citing *State v. Dwyer*, 105 F.3d 670, 1997 WL 8874 (10th Cir. (N.M.)).

In Defendant's problematic reliance on *Dwyer*, it is not so much what he relies on, but that he fails to inform this Court of the nature of the case. In *Dwyer*, New Mexico law afforded pro-se private prosecutions of state misdemeanor charges. The pro-se private prosecutor in Dwyer charged two federal employees with trespass. What the case reveals is that the alleged trespass by the federal employees actually occurred on federally owned land to which access was allowed under federal law, and therefore the charges were ultimately dismissed by the federal magistrate.

The facts contained in *Dwyer* are overwhelmingly distinguishable from the facts of Defendants case. Defendant Jimenez was on private deeded land with postings, a home, fences and other indications of private deeded land, knowing he could not be on private deeded land. This issue is not in dispute. Defendant has stated that he always asks for permission before entering private land, and when rejected, he does not trespass. Further, this assumes that the Defendant does not deposit his federally controlled objects (wolves) on private property when denied this permission.

Moreover, Defendant's own supervisor was told by Defendant that he would be operating on public land, not private. (See page 9 of Declaration of Edward E. Bangs). This becomes important because these federal employees know that in the State of Wyoming, they cannot be on private land without permission, which is exactly what Count I of the charging document states. Their recognition of Wyoming law is appreciated. Unfortunately, there is no "mistake" defense, either under federal or Wyoming law that provides them immunity for trespass. If they are on private land, knowing they cannot be on private land, they are guilty of trespass. Their ability and efforts to read maps to note the location of wolves prior to their mission is proof of their knowledge of Wyoming law. Their continuing duty (although breached) to respect Wyoming law during their wolf capture missions is documented in the Defendant's own Declaration, wherein he states:

> *"[t]he wind blew through the helicopter so fiercely that map reading became virtually impossible. I was the least familiar member of the capture team with the geographic area where the wolves had been spotted, and thus I relied on the pilots for guidance regarding areas that were non-public land. During the entire capture operation, I believed we were on public land and I had no intention during the operation of going onto private land."*

(See pages 4-5 of Declaration of Michael D. Jimenez).

Defendant seems to argue that although he was officially the organizer and in charge of the wolf capture mission, that he really relied on others to tell him where he was, and therefore was not truly in charge. Although possibly comforting to him in some unknown way, this is no defense to trespass, and certainly does not provide him any immunity to the charges he is currently facing.

Should the Defendant's argument prevail, any person may trespass in the State of Wyoming by merely stating "Oops, I did not know I was on private land." Such a defense, if allowed, could never be overcome by the State. Furthermore, the taxpayers expect and demand more from their professional servants than this type of defense.

The Defendant also heavily relies on *State of Texas v. Carley*, 885 F. Supp. 940 (W.D. Tex. 1994), for the proposition that he is immune from prosecution. Mr. Carley, a Fish and Wildlife Service employee was traveling on a road clearly marked public in a map compiled and produced by the State of Texas, when in fact the portion of the road where Carley confronted a land owner, was private. Once again, the facts in *Carley* are quite distinguishable from the facts to be borne out by the crimes the Defendant now faces.

As noted in the Declaration of Special Agent Steve Herrmann of the Wyoming Division of Criminal Investigation attached hereto, all Global Positioning System (GPS) coordinates noting a "wolf incident" on February 14, 2004, were retrieved from the helicopter used in the wolf capture mission.

Disturbingly, all GPS coordinates noting a "wolf incident" on that date, reference points that are private deeded land. Map Attachment A to Agent Herrmann's Declaration evidences this point. Certainly, this type of activity on behalf of a federal employee cannot be considered objectively reasonable under the second part of two prong test for immunity, especially when the trespassing took place numerous times presumably over a several hour period. It appears that quite possibly nothing the Defendant and his cohorts did on February 14, 2004, was on public land, but this question will remain until sworn witness testimony at trial. Certainly, this type of behavior on the behalf of the Defendant is not objectively reasonable, and is subjectively unbelievable.

Furthermore, Defendant is confused or has presumably unintentionally misled this Court by stating in his Motion to Dismiss that: "(1) his review of relevant maps prior to the start of the operation suggesting that the Washakie pack was on public land; (2) statements to him by the local helicopter pilot and the local fixed wing pilot that the Washakie pack was on public land; (3) **the lack of any fences, signs or postings** informing him that he was on anything other than public land during the course of the operation; (4) the **inability** to check maps from inside the helicopter as it chased wolves with its doors open;..." (emphasis added) (See page 17 of Defendant's Motion). Even the Defendant declared under oath "**There were no fences, cattle, signs, notices of private property, or postings or notices of any sort at the processing site. Nor were any such fences, signs, postings or**

notices located in either the general or specific vicinity of the gravel road where the helicopter pilot had deposited me." (See page 6 of Defendant's Declaration).

As noted in Agent Herrmann's Declaration and photo Attachment B, the photos supplied to the State by Defendant's own counsel, clearly show a fence located within approximately one hundred fifty (150) yards from where the private landowner encountered the Defendant with four (4) radio collared wolves, and is clearly visible from that location. Furthermore, one of the ranch's homes is visible in the photos, all of which discounts considerably Defendant's Declaration statements that there were no fences or notices of private property. Generally, a home is indicative of private property. Although not necessary to fence out trespassers in Wyoming, certainly, this type of fencing "notice" to the Defendant and his continued trespass thereafter cannot be considered objectively reasonable under the second part of the two prong test. (Note: the photos contained in Attachment B were sent to the State by Defendant's own counsel).

As for Defendant's statement to this Court that there was a lack of any signs or postings, the photos contained in photo Attachment C of Agent Herrmann's Declaration, clearly evidence that individuals are on notice that private property rights are at stake on the Larsen Ranch, located in Park County, Wyoming. If Defendant's argument on this point is to be given any merit, then Wyoming landowners will now have to point their signs skyward in order to give notice to employees of the

federal government chasing wolves in helicopters that they are on private land. Such an argument is ludicrous and will not be addressed any further.

The Defendant acknowledges wolf pack territories frequently exceed 300-400 miles, and that after darting a wolf, the wolf "frequently continues running over a mile before it succumbs to the drug and lies down." (See pages 2-4 of Defendant's Declaration) This is confirmed by and consistent with Defendant's supervisor's knowledge as well: "Once the pack hears the helicopter, they disperse and run frantically in all directions in an attempt to escape.....During this process wolves are running in different directions. Darted wolves travel some distance before becoming immobilized, and **a single capture operation on a pack usually involves an area of several square miles**" (Emphasis added). (See page 6 of Declaration of Edward E. Bangs)

As map Attachment A of Agent Hermann's Declaration clearly shows, the land in that particular area contains more private land than public. Defendant is a professional wolf man by his own admissions. Therefore, having looked at his own maps, knowing that wolf pack territories frequently exceed 300-400 miles, that the capture operation will involve a several square mile area, and that darted wolves frequently travel over a mile before going down, was it objectively reasonable for the Defendant to think that these particular wolves would stay on public land? Not only were the Defendant's actions subjectively unbelievable, they

were objectively unreasonable. Immunity must be denied, as he fails the two prong test.

The Washakie Pack has a long history of chronic livestock depredations. (See page 3 of Defendant's Declaration). The facts of this case reveal that the Defendant and his supervisor wanted the Washakie pack found and its members collared. It appears that the Defendant did just that at any cost, including by trespass and with no intent of notifying the landowner that he had just deposited at least four members of the predacious Washakie pack on his cattle producing private property. Again, subjectively unbelievable and objectively unreasonable summarize the Defendant's actions. Immunity must be denied.

The Facts and the Law Clearly Support the Trespass Charge

Defendant alleges that the Information is fatally defective and must be dismissed. Defendant simply misreads Wyoming Law.

Wyoming's criminal trespass Statute (6-3-303) reads in part:

(a) A person is guilty of criminal trespass if he enters or remains on or in the land or premises of another person, knowing he is not authorized to do so, **or** after being notified to depart or to not trespass. For purposes of this section, notice is given by:

(i) Personal communication to the person by the owner or occupant, or his agent, or by a peace officer, or

(ii) Posting of signs **reasonably likely** to come to the attention of intruders.

Defendant Jimenez' argument is confusing due in large part because he simply misreads the statute. Defendant Jimenez knew he could not be on private property, or the Declarations of several land owners would not be attached to his Motion. Defendant Jimenez was repeatedly on private property on February 14, 2004.

As previously mentioned, the Declaration and photo exhibit C clearly indicate that individuals are on notice that private property rights are enforced on the Larsen Ranch. Again, if Defendant's argument on this point is to be given any merit, then Wyoming landowners will have to point their signs skyward in order to give notice to employees of the federal government chasing wolves in helicopters that they are on private land. Once again, such an argument is ludicrous. Wyoming law does not demand this of landowners because such would be unreasonable. The statute merely requires the posting of signs "reasonably likely to come to the attention of intruders." Even the Defendant must acknowledge that most individuals and in this case intruders, are not deposited on private land by helicopter.

Not to belabor the point any further, please see Agent Herrmann's Declaration, wherein Defendant admitted that had he been driving on

Road 4CP and seen the signs in photo Attachment C, and then located wolves on the property, he would have secured the landowner's permission before going on the property. This single fact alone satisfies the "reasonableness" of the signage requirement of the statute.

The Facts and Law Support the Littering Charge

Defendant seems to have difficulty determining what the "objects" are referred to in Count II of the Information. For Defendant's benefit, those objects are lying at his feet in photo Attachment D. The factual circumstances underlying the littering of these objects is sufficiently spelled out in Agent Herrmann's Affidavit of Probable Cause.

Should the Court disagree with the State's position, it can order an amended information or bill of particulars as a far less harsh alternative than dismissal.

Finally, Defendant argues that "The State is Improperly Employing Criminal Charges to Subvert an Unpopular Federal Program in the State of Wyoming."

This argument is outside the scope of Rule 12 (b), legally insufficient, without merit, and is offensive to this prosecutor and the great people of the State of Wyoming and deserves no further response, but to add it is a proposition and argument that has been completely rejected by the United States Supreme Court. In *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959 (1988), the Court when speaking against the case removals from state court

of two postal employees charged with vehicular homicide and other traffic crimes, and reaffirming the law that federal officer removal must be predicated upon a federal defense stated:

> "[w]e can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions. .... Under our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is the Federal Government. Because the regulation of crime is pre-eminently a matter for the states, we have identified a strong judicial policy against federal interference with state criminal proceedings." (Id. at 969, citing from *Arizona v. Manypenny*, 451 U.S. 232, 243, 101 S.Ct. 1657 (1981)).

The Court further stated:

> "It is hardly consistent with this strong judicial policy to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is even at issue in such prosecutions. We are simply unwilling to credit the Government's ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers by charging them with traffic

violations and other crimes for which they would have no federal defense in immunity or otherwise." (*Mesa* at 969-70).

It is respectfully submitted that no federal defense has been stated by Defendant, no federal question is at issue, and Cheyenne, Wyoming is more than 800 miles roundtrip from Cody, Wyoming. **DATED** this 14th day of June, 2004.

RESPECTFULLY SUBMITTED:

/s/ Bryan A. Skoric
Bryan A. Skoric
Park County and Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Motion upon the attorney for the Defendant, Michael C. Johnson, by mailing a copy of the same to Michael C. Johnson, Assistant United States Attorney, 1225 Seventeenth Street, Suite 700, Denver, Colorado, 80202, postage prepaid in the U. S. on June 14, 2004.

/s/ Bryan A. Skoric
Bryan A. Skoric

DECLARATION OF SPECIAL AGENT STEVE HERRMANN

I am a Special Agent with the Wyoming Division of Criminal Investigation.

1. On March 2, 2004, I began an investigation into trespass allegations involving Michael Jimenez and Wesley Livingston. These allegations were made by Randall Kruger, shareholder and employee of the Larsen Ranch Company, located in Park County, Wyoming. The specific allegations, are more fully set forth in my Affidavit of Probable Cause, attached hereto.

2. As part of this investigation, I learned from an interview with a witness that a helicopter was used during the wolf capture mission on February 14, 2004, and that the helicopter was equipped with a Global Positioning System. I further learned that several coordinates were "locked" into the helicopter's GPS system during the wolf capture mission indicating that a "wolf incident" had occurred at that particular location. I subsequently acquired these GPS coordinates from the same helicopter used during the wolf capture mission on February 14, 2004.

3. From my interview with this witness, I learned that during the wolf capture mission, the pilot locked particular coordinates into the GPS device when darts and or capture nets were fired from the helicopter. The pilot does this in order to designate that particular location in order for the darts and or nets to be retrieved in case the darts

and or nets miss their intended targeted objects. (See map Attachment A – Points W1-W5).

4. A review and placement of these coordinates on a map overlay revealed that all "wolf incident" coordinates correspond to private deeded land. I have attached this map overlay showing the corresponding GPS coordinates to this private deeded land. (See map Attachment A – Points W1-W5).

5. As part of this investigation, I also reviewed numerous photographs, including five particular photographs provided to the State by the United States Attorney's Office for the District of Colorado. (See photo Attachment B).

6. As part of my investigation, I have visited the exact location where the photographs were taken. I have since determined that the photographer in all probability had to be standing on private deeded land in order to capture at least one of the five photos.

7. These five photographs are of the general vicinity where the landowner confronted Defendant Jimenez and Defendant Livingston on February 14, 2004, and do show the exact location where this encounter occurred, as well as the point where the helicopter deposited Defendant Jimenez on County Road 4CP. In three of the five photographs, I noted a barbed wire fence approximately less than one hundred fifty (150) yards from where Defendants Jimenez and Livingston were confronted by the landowner. Also, in three of the five photographs, I

determined that one of the Ranch's homes was captured by the photographer in these photos. I have circled the home in photo number 1 for the parties' convenience.

8. As part of my investigation, I also took several photos of signs and postings on Larsen Ranch Company property. These photos were taken on County Road 4CP from the east side to the west side of the Larsen Ranch Company property. These signs and postings clearly identify private property adjacent to County Road 4CP. (See photo Attachment C).

9. In an interview with the Defendant, I showed him the photos contained in Attachment C. I asked him if he were driving on County Road 4CP and saw wolves on the property what he would do. After reviewing the photos, the Defendant stated that with those signs along the road, he would secure landowner permission before going on the property.

10. As part of my investigation, I also reviewed several photos given to the State by the landowner. As I have interviewed the Defendant, I am familiar with him. Two of these photos are of the Defendant standing with four objects. My initial perception was that these objects were wolves. (See photo Attachment D). From my interview with the Defendant, I believe the objects were in fact wolves. I have determined through my investigation that these photos captured the Defendant and the objects on deeded private property belonging to the Larsen Ranch Company, located in Park County, Wyoming.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 14th day of June, 2004

/s/STEVEN J. HERRMANN
Special Agent Steve Herrmann
Wyoming Division of
Criminal Investigation

Subscribed and sworn to before me this /14th/ day of June, 2004, by Steve Herrmann.

SEAL:

/s/PAULA J. KUCK
Notary Public
My Commission Expires:
/October 17, 2005/

W6
W4
W3
35
Larsen Ranch Co., A Corp.
Blue = State Lands
Yellow = BLM Lands
HOT SPRINGS COUNTY
NOT TO SCALE
N

OPPOSITION BRIEF

FILED
OCT 6 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-23

In the Supreme Court of the United States

STATE OF WYOMING, PETITIONER

v.

MICHAEL DAVID JIMENEZ
AND WESLEY O. LIVINGSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT MICHAEL DAVID JIMENEZ IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
BARBARA L. HERWIG
AUGUST E. FLENTJE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court's failure to hold an evidentiary hearing under 28 U.S.C. 1446(c)(5) before permitting removal of respondents' state criminal prosecution constituted harmless error.

2. Whether respondents were entitled to Supremacy Clause immunity from state criminal prosecution.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Kentucky v. *Long*, 837 F.2d 727 (6th Cir. 1988) 12
Mayor v. *Cooper*, 73 U.S. (6 Wall.) 247 (1868) 9
Mesa v. *California*, 489 U.S. 121 (1989) 8
United States v. *Mechanik*, 475 U.S. 66 (1986) 9
Willingham v. *Morgan*, 395 U.S. 402 (1969) 9

Constitution, statutes, regulation and rule:

U.S. Const. Art. VI (Supremacy Clause) 4, 5, 10, 12
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 1
28 U.S.C. 1442(a)(1) 3, 4, 8, 9
28 U.S.C. 1446(c)(5) 3, 8
50 C.F.R. 17.84(i)(8) 2
Fed. R. Crim. P. 52(a) 8

Miscellaneous:

59 Fed. Reg. 60,252-60,263 (1994) 2

In the Supreme Court of the United States

No. 06-23

STATE OF WYOMING, PETITIONER

v.

MICHAEL DAVID JIMENEZ
AND WESLEY O. LIVINGSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT MICHAEL DAVID JIMENEZ IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 443 F.3d 1211. The order of the district court (Pet. App. 45-74) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2006. The petition for a writ of certiorari was filed on July 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1994, acting pursuant to his authority under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, the Secretary of the Interior ordered the reintro-

duction of gray wolves in Wyoming and surrounding States. 59 Fed. Reg. 60,252-60,263 (1994). The Department of the Interior subsequently published regulations authorizing the Fish and Wildlife Service (FWS) to supervise the reintroduction. In order to control predation on livestock in the area, those regulations require FWS to monitor the reintroduced wolves. See 50 C.F.R. 17.84(i)(8). FWS does so primarily by fitting the wolves with radio collars, which allow FWS and local ranchers to track the wolves and, where necessary, to take appropriate action to protect livestock. Pet. App. 3-4, 34-35.

Respondent Michael David Jimenez was the leader of FWS's Wyoming Wolf Recovery Project; respondent Wesley O. Livingston, an experienced wolf handler, was a federal contractor working on the project. On February 13, 2004, FWS officials spotted a pack of gray wolves near Meeteetse, Wyoming, in an open area far outside their normal range. Although respondent Jimenez was unfamiliar with the area, two other participants in the operation told him that they believed that the wolves were located on federal land. Accompanied by a pilot, respondents pursued the pack by helicopter and, using net and dart guns, successfully immobilized five wolves. Although respondents did not know it at the time, information subsequently collected from the helicopter's global positioning system (GPS) indicated that, when respondents fired their guns, the wolves were located on private land. Pet. App. 5-7.

Working with the helicopter pilot, respondents collected the five wolves in a central location, where they examined them and fitted them with collars. Respondent Jimenez subsequently stated that there were no fences, signs, or cattle at the location. As respondents were processing the wolves, Randy Kruger, an employee

of the Larsen Ranch Company, drove up a neighboring road and stopped nearby. He asked Jimenez what respondents were doing; after Jimenez told him, he took several pictures of Jimenez with the wolves. Kruger did not indicate to Jimenez that respondents were on private land. After an apparently friendly conversation, Kruger went on his way. Pet. App. 7-8.

2. The gray-wolf reintroduction program was the object of strong local opposition. Upon learning of the capture operation, Wyoming state officials undertook an investigation to determine whether respondents had been on private land or on the public right-of-way adjoining the nearby road. After conducting a survey, the officials determined that respondents had been on private land owned by the Larsen Ranch Company. The Park County Prosecutor's Office subsequently filed misdemeanor trespass and littering charges against respondents in state court. Pet. App. 4, 8-9.

3. Respondents filed notices of removal in the United States District Court for the District of Wyoming pursuant to 28 U.S.C. 1442(a)(1), which authorizes the removal of a criminal prosecution commenced in state court against "any officer * * * of the United States * * * sued in an official or individual capacity for any act under color of such office." A separate provision specifies that, before permitting removal of a criminal prosecution, a federal court "shall order an evidentiary hearing to be held promptly and after such hearing shall make disposition of the prosecution as justice shall require." 28 U.S.C. 1446(c)(5). The district court ordered removal of both prosecutions without holding an evidentiary hearing.

Petitioner then moved to vacate the orders of removal, contending, *inter alia*, that the district court had

erred by permitting removal without holding an evidentiary hearing; respondents moved to dismiss the prosecution, contending that they were immune from suit under the Supremacy Clause of the Constitution. After holding a hearing on those motions, the district court denied petitioner's motions to vacate and granted respondents' motions to dismiss. Pet. App. 45-74.

As to the failure to hold an evidentiary hearing, the district court reasoned that, "[w]here there is no disagreement as to the facts relevant to the Court's determination of the removal issue, no evidentiary hearing is required by Section 1446(c)(5)." Pet. App. 63. The court explained that "Section 1442(a)(1) requires no more than the assertion of a colorable defense," and determined that "[b]oth defendants have raised colorable federal defenses, specifically that they are immune from prosecution under the Supremacy Clause." *Id.* at 64. As to the substantive question of immunity, the district court concluded that respondent Jimenez was "performing acts [he was] authorized to perform by federal law"; that he "subjectively believed that his actions were authorized by federal law"; and that "this belief was also objectively reasonable." *Id.* at 73. The court also concluded that respondent Livingston "was acting under the instruction and supervision" of Jimenez and was therefore "likewise immune from prosecution." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-44.

a. The court of appeals first held that the district court correctly denied petitioner's motions to vacate the removal orders. Pet. App. 24-33. The court noted that the relevant removal statute, 28 U.S.C. 1442(a)(1), had been construed to permit removal only where a federal officer had alleged a colorable federal defense: *e.g.*, that the officer had immunity under the Supremacy Clause.

Pet. App. 28. The court reasoned that "[t]he district court's decision that no evidentiary hearing was required may seem to be commonsensical," because "[t]here is no need for a court to hold an evidentiary hearing in a matter when there are no material facts in dispute." *Id.* at 29. The court also observed, however, that "the text of § 1446(c)(5) is unequivocal." *Id.* at 30.

Ultimately, the court of appeals concluded that it "need not determine whether the district court's decision to forego an evidentiary hearing was legal error," on the ground that, under the circumstances, "any error was without a doubt harmless." Pet. App. 31. The court noted that "there were no material facts in dispute" because "[i]t is undisputed that [respondents] were federal officials, and likewise undisputed that they have a colorable federal defense," and "[t]hat is all that is required for removal under § 1442(a)(1)." *Id.* at 31-32 (footnote omitted). "In our view," the court reasoned, "to reverse and remand to the district court for an evidentiary hearing (on nothing), as [petitioner] requests, would be a colossal waste of time and resources." *Id.* at 32.

b. The court of appeals then held that the district court correctly granted respondents' motions to dismiss on the basis of Supremacy Clause immunity. Pet. App. 11-23, 33-44. After discussing at length the decisions of this Court (and of other courts of appeals) on Supremacy Clause immunity, the court stated that "a federal officer is not entitled to Supremacy Clause immunity unless, in the course of performing an act which he is authorized to do under federal law, the agent had an objectively

reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties." *Id.* at 23.*

Applying that standard, the court of appeals first determined that respondents' actions were authorized by federal law. Pet. App. 34-37. The court noted that the applicable regulations "do not merely authorize, but impose an obligation on[,] [FWS] to monitor wolves." *Id.* at 35. While the regulations "[do] not contain an explicit grant of authority for [FWS] staff to trespass," the court reasoned, "Supremacy Clause immunity does not require that federal law explicitly authorize a violation of state law." *Id.* at 36.

The court of appeals next determined that respondents had an objectively reasonable and well-founded basis to believe that their actions were necessary to fulfill their duties. Pet. App. 37-44. The court noted that "[i]t is not clear to us that [respondents] would have lacked an objectively reasonable basis to believe their actions were necessary to the performance of their functions[] even if they had been aware they were on private land." *Id.* at 39. The court determined, however, that "the undisputed evidence in the record establishes that [respondents'] belief that they were on [public] land was objectively reasonable and well-founded." *Ibid.* The court explained that, "[g]iven the expansive range of gray wolves as well as their propensity to run in any direction after being darted, it would be an onerous burden on federal officers * * * to require them to determine the precise boundaries of land that *might* be encountered, on threat of criminal prosecution if they

---

* The court of appeals "le[ft] for another day the question whether that belief must be both subjectively and objectively reasonable," noting that "[petitioner] does not dispute that [respondents] subjectively believed they were on federal land." Pet. App. 23.

should be in error." *Id.* at 39-40. The court concluded that "[o]ur review of the evidence presented to the district court demonstrates that * * * [respondents] confined their acts to an objectively reasonable view of the scope of their authority." *Id.* at 43.

The court of appeals rejected petitioner's contention that respondents should have known they were operating on private land on the grounds that (1) the GPS data showed that, when respondents fired their guns, the wolves were located on private land, and (2) structures and signs in the vicinity should have alerted respondents to the fact that they were on private land. Pet. App. 41-43. As to the GPS data, the court reasoned that, "at most, the GPS coordinates could have enabled [respondents], after the fact, to determine where they had been when they encountered the wolves." *Id.* at 41. As to the structures and signs, the court reasoned that "the structures were not in the immediate vicinity of [respondents] while they were tending to the wolves" and that "[the signs] did not provide [respondents] reason to know they were trespassing, because the signs implicitly authorize entry." *Id.* at 42-43.

The court of appeals concluded that "[g]ranting immunity in this case serves the purposes for which Supremacy Clause immunity was developed." Pet. App. 44. The court noted that "[t]he record evidence supports the suspicion that the prosecution of [respondents] was not a bona fide effort to punish a violation of Wyoming trespass law, * * * but rather an attempt to hinder a locally unpopular federal program." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of

another court of appeals. Petitioner identifies no issue that merits this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner first contends (Pet. 6-16) that the court of appeals erred by holding that the district court's failure to hold an evidentiary hearing under 28 U.S.C. 1446(c)(5) before permitting removal constituted harmless error. Petitioner, however, fails to identify any case in which a court has awarded relief in similar circumstances for the failure to hold an evidentiary hearing under Section 1446(c)(5).

Moreover, the court of appeals correctly held that, even assuming that the district court erred in not conducting an evidentiary hearing, any such error was harmless in the circumstances of this case. Section 1446(c)(5) provides that, before ordering removal of a criminal prosecution, a district court "shall order an evidentiary hearing to be held promptly." As a preliminary matter, it is questionable whether Section 1446(c)(5) requires the district court to conduct an evidentiary hearing even where (as here) there is no genuine issue of material fact as to which an "evidentiary hearing" would be meaningful. See Pet. App. 29 (noting that "[t]here is no need for a court to hold an evidentiary hearing in a matter when there are no material facts in dispute"). Even assuming that it does, however, Section 1446(c)(5) does not specify a remedy for the failure to hold an evidentiary hearing, and such a failure is therefore subject to harmless-error analysis. Cf. Fed. R. Crim. P. 52(a).

Any error in this case was in fact harmless. In order to obtain removal under the federal officer removal statute, 28 U.S.C. 1442(a)(1), a federal officer need only allege a colorable federal defense. See, *e.g.*, *Mesa* v. *Cali-*

fornia, 489 U.S. 121, 125-134 (1989); *Willingham* v. *Morgan*, 395 U.S. 402, 409 (1969); *Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252, 254 (1868). Where a district court fails to hold an evidentiary hearing in an action for which removal is sought under Section 1442(a)(1), but subsequently holds that the federal officer has a *valid* federal defense (and thus dismisses the action), it would be futile to remand for such a hearing, because the court's subsequent holding that the federal officer had a valid federal defense necessarily forecloses the conclusion that the federal officer lacked even a *colorable* federal defense (and thus lacked a basis for removal in the first place). See Pet. App. 32 (noting that "to reverse and remand to the district court for an evidentiary hearing * * * would be a colossal waste of time and resources"); cf. *United States* v. *Mechanik*, 475 U.S. 66, 70-71 (1986) (holding that an error at the grand jury stage was harmless on ground that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt"). In such circumstances, there is no basis for disturbing the district court's subsequent decision to dismiss the prosecutions.

Petitioner asserts (Pet. 14) that (1) the district court should have held an evidentiary hearing because "[i]ssues were clearly in dispute on immunity" and (2) the failure to hold an evidentiary hearing tainted the district court's subsequent decision to dismiss the prosecutions because petitioner could have developed facts at the evidentiary hearing that would have "substantiate[d] or alleviate[d] ultimate issues on immunity." Petitioner, however, fails to identify a disputed issue of material fact relevant to the question of *removal*. That is unsur-

prising, because petitioner does not assert (nor could it plausibly do so) that respondents lacked even a *colorable* defense of Supremacy Clause immunity. See Pet. App. 31-32 (noting that "[i]t is undisputed that [respondents] were federal officials, and likewise undisputed that they have a colorable federal defense") (footnote omitted). Moreover, petitioner concedes (Pet. 21) that, although the district court did not conduct an evidentiary hearing before granting removal, it did permit petitioner to present factual evidence in response to respondents' subsequent motion to dismiss on grounds of Supremacy Clause immunity. Indeed, petitioner evidently took advantage of that opportunity. See, *e.g.*, Pet. App. 71 (citing affidavit and declaration of Wyoming state official). Because the court of appeals correctly held that the failure to conduct an evidentiary hearing was harmless, and because petitioner identifies no conflicting authority, further review on that issue is unwarranted.

2. Petitioner contends (Pet. 16-28) that the court of appeals erred by upholding the district court's dismissal of the prosecutions on the ground that respondents were entitled to Supremacy Clause immunity. Petitioner does not suggest, however, that the court of appeals applied an erroneous legal standard in determining whether respondents had Supremacy Clause immunity—much less a standard that conflicts with that adopted by this Court or any other court. To the contrary, petitioner concedes (Pet. 17) that the applicable legal standard is "well established."

Petitioner does not dispute that respondents satisfied the first prong of the governing legal standard: namely, whether respondents were "performing [acts] which [they were] authorized to do under federal law." Pet. App. 23. Instead, petitioner merely argues (Pet. 21-

28) that the court of appeals misapplied the second prong of that standard: namely, whether respondents "had an objectively reasonable and well-founded basis to believe that [their] actions were necessary to fulfill [their] duties." Pet. App. 23. The court of appeals' resolution of that fact-bound issue was correct, and, in any event, the fact-bound application of a "well established" legal standard does not warrant further review.

As the court of appeals determined (Pet. App. 39), respondents reasonably believed that they were not on private land—and, *a fortiori*, had an objectively reasonable basis for believing that their actions were necessary to the performance of their duties. Cf. *ibid.* (suggesting that respondents may have had an objectively reasonable basis for that belief even if they had known that they were on private land). Petitioner correctly notes (Pet. 21) that respondents were in fact on private land while conducting their operations, but errs by contending (Pet. 22-23) that respondents should have *known* that they were operating on private land based on (1) the GPS data and (2) structures and signs in the vicinity. As the court of appeals noted (Pet. App. 42), the GPS data at most could have enabled respondents to determine after the fact where the wolves were located, because (as respondent seemingly concedes, Pet. 22) it would have been difficult, if not impossible, for respondents to pinpoint their location on maps while they were conducting their helicopter operations. And as the court of appeals also noted (Pet. App. 42-43), there is no indication that the structures were in the *immediate* vicinity of respondents while they were conducting their operations, and the signs at most would have led respondents to believe that any entry onto private land was authorized (even assuming that respondents saw them at all).

More generally, petitioner offers no response to respondents' evidence (1) that two other participants in the operation told respondent Jimenez that they believed that the wolves were located on federal land, and (2) that the employee of Larsen Ranch Company whom respondents encountered failed to indicate in any way that respondents were trespassing. See Pet. App. 40. Nor does petitioner identify any genuine issue of material fact that would have precluded the district court from ruling on respondents' Supremacy Clause defense at the motion-to-dismiss stage. Cf. *Kentucky* v. *Long*, 837 F.3d 727, 752 (6th Cir. 1988) (noting that, "when a threshold defense of federal immunity is raised to meet a state criminal prosecution, the state cannot overcome that defense merely by way of allegations," but "must come forward with an evidentiary showing sufficient at least to raise a *genuine* factual issue").

Because the court of appeals correctly concluded, based on undisputed material facts, that petitioner had an objectively reasonable and well-founded belief that they were not on private land, it correctly upheld the dismissal of the prosecutions. And because petitioner cites no conflict of authority on the governing standard for Supremacy Clause immunity, it identifies no issue that merits further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

BARBARA L. HERWIG
AUGUST E. FLENTJE
Attorneys

OCTOBER 2006